Buffalo Law Review

Volume 69 | Number 3 Article 3

6-17-2021

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Buffalo Law Review

VOLUME 69 MAY 2021 NUMBER 3

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ABSTRACT

Times of emergency call for drastic measures. These steps may include the physical takeover of privately-owned assets by the government for a certain period of time and for various purposes, aimed at addressing the state of emergency. When will such acts amount to a taking, and what compensation should be paid to the property owner? How do temporary physical appropriations during times of emergency diverge, if at all, from temporary takeovers in more ordinary times?

The doctrinal and theoretical analysis of potential temporary takings has been done mostly in the context of non-physical government intervention with private property, such as when a local government imposes a temporary moratorium on land development until a certain condition is met. This Article focuses, however, on less investigated scenarios of temporary physical takeovers or other forms of government invasions. It seeks to identify the differences between a temporary invasion and a permanent occupation of property considered a per se taking under the *Loretto* rule. In so doing, this Article argues that while the alleged distinction between prevention of public harm and promotion of public benefit often proves untenable in evaluating whether a permanent government measure constitutes a taking, it might make more sense in exploring temporary acts.

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Temporary eminent domain—referring here to various types of acts amounting to time-limited physical takings, even if not initially recognized as such by the government—may diverge from permanent eminent domain in yet another key element: identifying the basis for just compensation. Under long established (although often criticized) rules, compensation for a permanent taking is based on identifying the "fair market value" of the rights taken, while ignoring the effects that the public use for which the underlying asset is taken might have on the property's long-term value.

The allegedly parallel metric used in the case of temporary takings, one of "fair rental value," may often prove inadequate, both practically and normatively. This Article argues that because of unique aspects of temporary physical takings, legal rules on compensation should often seek to identify lost profits or actual damage. Moreover, in some cases, in which there is a direct relation between the pre-appropriation use of the asset and its post-appropriation use by the government, just compensation might also be based on a certain portion of the value of the public use. This is especially so when the time-sensitive value of the asset during such public use is particularly high. On this point, the Article offers an analogy to rules pertaining to compulsory licenses for patents.

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I. INTRODUCTION

On March 12, 2020, after the COVID-19 virus started spreading significantly across the United States, California Governor Gavin Newsom issued an Executive Order aimed at addressing the crisis.[1] The Executive Order enabled the State of California, inter alia, to exercise its power to "commandeer property . . . suitable for use as places of temporary residence or medical facilities as necessary for quarantining, isolating, or treating individuals who test positive for COVID-19 or who have had a high-risk exposure and are thought to be in the incubation period."[2] The governor acted pursuant to Section 8572 of the California Government Code, authorizing him to "commandeer or utilize any private property or personnel deemed by him necessary" during "a state of war emergency or state of emergency," provided that "the state shall pay the reasonable value thereof."[3]

The initial plan indeed focused on accommodating coronavirus patients and other persons required to stay in isolation.[4] The power to coercively take over private property was to be reserved as a backup option should the State not be able to provide enough spaces through voluntary arrangements with hotels (such deals already being cut before the Executive Order, such as with a hotel in San Carlos to house 120 people who had been on board the Grand Princess cruise ship).[5]

A few days later, when it turned out that, for the time being, agreements made with hotels, in addition to the use of government facilities, were able to meet demand for housing patients and others in isolation, the focus shifted to another group requiring immediate assistance: homeless people.[6] Identifying the homeless in California as a

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1. Exec. Order No. N-25-20 (Mar. 12, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/03/3.12.20-EO-N-25-20-COVID-19.pdf.

2. *Id.* § 8.

3. CAL. GOV'T CODE § 8572 (West 2021).

4. *See* Taryn Luna, *Newsom Issues Order Allowing California to Take Over Hotels for Coronavirus Patients*, L.A. TIMES (Mar. 12, 2020, 4:43 PM), https://www.latimes.com/california/story/2020-03-12/california-governor-gavin-newsom-hotels-medical-facilities-patients-meeting-requirements#:%7E:text%E2%80%A6.

5. *See* Melissa Daniels, *Coronavirus Update: California Gets Power to Take Over Hotels, Motels to Isolate Patients*, PALM SPRINGS DESERT SUN (Mar. 12, 2020, 7:35 PM), https://www.desertsun.com/story/news/2020/03/12/california-has-power-take-over-hotels-coronavirus-quarantines/5037215002/.

6. *See* Wes Venteicher & Theresa Clift, *California Plans to Use Private Hotels, Motels to Shelter Homeless People as Coronavirus Spreads*, SACRAMENTO BEE (Mar. 15, 2020, 5:38

group of over 100,000 persons particularly vulnerable to contracting the coronavirus—while regularly lacking access to medical care—and to spreading the disease further, the State sought to accommodate the homeless in hotels and motels.[7]

Accordingly, to meet the potential demand for temporary residences not only for patients, people in quarantine, and the homeless, but also for "first responders" such as medical personnel, cities across California have also started to explore their own powers to commandeer property. Thus, in San Francisco, the Office of the City Attorney published a Memorandum on the "City Power to Commandeer Private Property for COVID-19 Emergency Purposes."[8] The Memorandum outlines the power granted to the mayor (requiring the concurrence of the Board of Supervisors "as soon as reasonably possible") to commandeer property in times of emergency based on the City's Charter and its Administrative Code,[9] and the parallel authority of the local health officer to do the same (without the need for concurrence) under the California Health and Safety Code.[10]

To commandeer property, the City must issue a written order to commandeer and provide notice to the affected property owners. The commandeer order "must present the City's justification for its acts and must narrowly tailor those acts to the particular circumstances," requiring the City to "establish the immediate necessity to commandeer the particular property or properties at issue, document the emergency conditions leading to the need to commandeer the property and the lack of suitable alternatives."[11] The Charter and Administrative Code are laconic about the payment of "fair value" and do not provide specific procedures for determining such value. Moreover, the City may, but is not required to, announce the sum to be paid, when it commandeers the

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PM), https://www.sacbee.com/news/local/article241216061.html.

7. *Id*.; *see also* Sarah Holder & Kriston Capps, *No Easy Fixes as Covid-19 Hits Homeless Shelters*, BLOOMBERG: CITYLAB (Apr. 17, 2020, 5:34 PM), https://www.bloomberg.com/news/articles/2020-04-17/no-easy-fixes-as-covid-19-hits-homeless-shelters.

8. Memorandum from Kristen A. Jensen & Brian F. Crossman, Deputy City Att'ys, City & Cnty. of San Francisco, to London N. Breed, Mayor, City & Cnty. of San Francisco (Apr. 13, 2020) (on file with author) [hereinafter SF Memorandum].

9. Charter of the City of S.F., § 3.100(14); City of S.F., Admin. Code, § 7.6(b)(2).

10. CAL. HEALTH & SAFETY CODE § 120175 (West 2021).

11. SF Memorandum, *supra* note 8, at 4.

property.[12]

Granting power to government to commandeer, or to otherwise take over private property for a certain period of time to handle the COVID-19 crisis—at least as a backup option while trying to reach agreements with property owners to make their assets available—is obviously not limited to California or to the United States at large. Countries throughout the world have been grappling with the same basic issues.[13] Thus, for example, the government in India proclaimed its power to take over hotels and convention halls for isolation, quarantine, and treatment of COVID-19.[14] Moreover, the need for government intervention stems also from the fact that doctors and other frontline medical workers who rent apartments have been evicted by their homeowners because of the fear that they may be infected after working with coronavirus patients.[15] Also, the need to temporarily shelter homeless people in hotels has arisen in other places across the world.[16] Moreover, the need for urgent, temporary accommodation also concerns violent spouses and their victims in view of the surge in domestic violence as a result of lengthy stay-at-home lockdowns.[17]

In addition to the explicit use of commandeer orders and government's general authority of eminent domain to temporarily seize possession of private properties, other government actions undertaken to

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12. *Id*. at 3.

13. *See* Anna Ahronheim, *TA's Dan Panorama, Jerusalem's Dan to Open as Quarantine Centers*, JERUSALEM POST (Mar. 17, 2020), https://www.jpost.com/israel-news/dan-panorama-and-hyatt-hotels-to-open-as-coronavirus-quarantine-centers-621200 (reporting that the Israeli military took over temporary control and management of hotels); Feargus O'Sullivan, *Barcelona's Latest Affordable Housing Tool: Seize Empty Apartments*, BLOOMBERG: CITYLAB (July 16, 2020, 12:48 PM), https://www.bloomberg.com/news/articles/2020-07-16/to-fill-vacant-units-barcelona-seizes-apartments (reporting that the City of Barcelona took over empty vacation rentals for emergency housing during the pandemic).

14. *Govt to Take Over Hotels, Convention Halls as Isolation Centres*, TIMES OF INDIA (Mar. 24, 2020, 4:44 AM), https://timesofindia.indiatimes.com/city/bhopal/govt-to-take-over-hotels-convention-halls-as-isolation-centres/articleshowprint/74783236.cms.

15. Jessie Yeung & Swati Gupta, *Doctors Evicted from Their Homes in India as Fear Spreads Amid Coronavirus Lockdown*, CNN (Mar. 25, 2020, 11:34 AM), https://www.cnn.com/2020/03/25/asia/india-coronavirus-doctors-discrimination-intl-hnk/index.html.

16. *Emergency Hotel Accommodation Secured for All Rough Sleepers in Glasgow*, SCOT. HOUS. NEWS (Mar. 26, 2020), https://www.scottishhousingnews.com/article/emergency-hotel-accommodation-secured-for-all-rough-sleepers-in-glasgow.

17. Lee Yaron, *In First, Israel Houses Abusive Men in Hotels to Protect Battered Women*, HAARETZ (May 7, 2020), https://www.haaretz.com/israel-news/.premium-in-first-israel-houses-abusive-men-in-hotels-to-protect-battered-women-1.8826256.

address the COVID-19 pandemic also amount to *de facto* takeover of the use of private assets. Thus, for example, in March and April of 2020, then-President Donald Trump invoked the federal government's wartime powers, under the Defense Production Act,[18] to order General Motors and other key manufacturers to make ventilators,[19] alongside a similar order issued to the 3M Company to make N95 masks.[20]

As this Article shows, such combination of temporary measures, including both the explicit use of eminent domain and similar proceedings, alongside other forms of takeover of production and/or use of an asset, was done by the U.S. government during the Second World War. In a series of decisions, the U.S. Supreme Court, while recognizing such measures as amounting to temporary takings, established rules for just compensation—the validity and appropriateness of which for current purposes and for the entire plethora of temporary physical takings will be explored.[21]

Accordingly, in this Article, I use the term "temporary eminent domain" quite broadly to refer to various types of acts amounting to time-limited physical takings, even if not initially recognized as such by the government. That is, in addition to explicit *ex ante* procedures of eminent domain or commandeer orders, the term applies also to other measures taken by government—the practical effect of which is to physically take over control of the asset or to otherwise unequivocally redirect the use of the asset to serve a certain public purpose for a certain period of time. If such latter measures are recognized, or should be recognized, by courts *ex post* as constituting a temporary "de facto condemnation"[22] or inverse

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18. Defense Production Act of 1950, 50 U.S.C. § 4501.

19. Claire Bushey, Andrew Edgecliffe-Johnson & Kiran Stacey, *Trump Invokes Federal Law to Compel General Motors to Make Ventilators*, FIN. TIMES (Mar. 27, 2020), https://www.ft.com/content/9328d358-1588-4498-97d9-0dd43255a076; Taylor Hatmaker, *White House Says It Is Ordering More Companies to Make Ventilators*, TECHCRUNCH (Apr. 2, 2020, 5:26 PM), https://techcrunch.com/2020/04/02/trump-coronavirus-dpa-gm-medtronic-resmed/.

20. Maegan Vazquez, *Trump Invokes Defense Production Act for Ventilator Equipment and N95 Masks*, CNN POLITICS (Apr. 2, 2020, 8:18 PM), https://www.cnn.com/2020/04/02/politics/defense-production-act-ventilator-supplies/index.html.

21. *See infra* Parts III.A, III.B, IV.A.

22. The doctrine of "de facto condemnation" applies when "an entity clothed with the power of eminent domain substantially deprives an owner of the beneficial use and enjoyment of his property." *In re* Mountaintop Area Joint Sanitary Auth., 166 A.3d 553, 561–62 (Pa. Commw. Ct. 2017). It requires the plaintiff to prove that "the damages sustained were the immediate, necessary, and unavoidable consequences of the exercise of the eminent domain

condemnation,[23] this Article analyzes them under a more general framework of "temporary eminent domain." This is, of course, not to say that all forms of temporary takeovers should be considered as compensable takings per se. This Article identifies, rather, the normative criteria for identifying certain types of temporary takeovers as takings.

By focusing on temporary physical takeovers, and on whether these constitute compensable takings, this Article takes a different route from the more common analysis of "temporary takings" that deals with non-physical or regulatory interventions with private property—such as when a local government imposes a temporary moratorium on land development until a certain condition is met. The thick and often complex (and incoherent) body of doctrine that developed in examining such temporary regulations is based primarily on the three-prong balancing test of *Penn Central*[24] for permanent regulations, and its adaptation to temporary regulations in cases such as *First English*[25] and *Tahoe-Sierra*[26] (analyzed in Part III.A).

In this Article, I argue that temporary physical takeovers, and the extent to which they constitute "temporary eminent domain," merit a distinctive type of analysis because of the qualitative differences between the two categories. Such differences relate not only to the types of circumstances under which government is temporarily taking over (as opposed to regulating) private property, but also to the diverging normative justifications for recognizing such actions as takings and for setting the standards for evaluating just compensation.

This Article proceeds as follows. Part II portrays some fundamental legal principles concerning permanent takings. It starts by briefly highlighting the development of per se rules versus balancing tests for various types of permanent government measures. It then identifies and evaluates the distinction drawn in *Hadacheck*[27] and subsequent cases between government interference with property intended to prevent a

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power." *Id*. at 561.

23. An "inverse condemnation" claim is the more general term used when a claimant institutes a suit, alleging that a taking has occurred, and requiring compensation for it. *See* JESSE DUKEMINIER ET AL., PROPERTY 1065 (9th ed. 2018).

24. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

25. First Eng. Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

26. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302 (2002).

27. Hadacheck v. Sebastian, 239 U.S. 394 (1915).

"public bad" and that which seeks to promote a public benefit.

Part III moves to discuss the current legal landscape of temporary takings. It analyzes case law that deals with various types of temporary measures—physical or regulatory—and whether these amount to compensable takings. It then explores the principles developed to establish just compensation in cases that are considered as amounting to a temporary taking, mostly by identifying "fair rental value" as a replacement for "fair market value."

Part IV seeks to re-conceptualize and normatively reevaluate "temporary eminent domain." It starts by outlining the plethora of cases in which government may temporarily take over private property, and how this may happen not only during times of emergency but also in "wait periods." It then readdresses the public harm/public benefit distinction, suggesting that such a test might make more sense for temporary takeovers as compared with assessing permanent measures. In addition to identifying economic consequences of temporary takeovers, this part also looks at non-instrumental injuries that may occur, and how these diverge from cases of permanent takeovers.

Part IV also examines the ways in which, in the case of contemporary takeovers, there is greater likelihood of affinity between the pre-appropriation use and the temporary post-appropriation use, paying particular attention to scenarios in which government use may be considered opportunistic. It then draws an analogy from the use of compulsory licenses for patents, in which the length of time of the license and its particular timing during the twenty-year life of the patent may be crucial. These insights form the basis for a new taxonomy of temporary takeovers as compensable takings.

Part IV then establishes practical and normative principles for calculating just compensation for temporary eminent domain. It starts by presenting the "fair rental value" criterion, established by the Supreme Court, mostly in dealing with temporary takeovers during the Second World War. This criterion is, however, often impractical, such as when the asset has no rental value because of the underlying emergency situation, like in the case of empty hotels in the coronavirus crisis. Moreover, such a criterion may be also flawed normatively, because it disregards particular types of losses that a property owner may incur because of the temporary nature of the government use, i.e., *before* the forced appropriation and *after* its release from the public use, in a manner not reflected in regular rates of market rents. This uniqueness of temporary takeovers, as opposed to permanent ones, may require courts

to consider compensation for actual damages or lost profits.

Moreover, whereas in the case of permanent eminent domain the property owner is not entitled to share in any surplus to the asset's value resulting from the public use, a case can be made for such revenue/benefit sharing in temporary eminent domain because of the particular affinity between the pre-appropriation and post-appropriation uses. Here too, the Article draws an analogy from the way in which royalties are paid to patent owners in the case of compulsory licenses. This analysis sets the stage for a comprehensive new legal taxonomy of temporary eminent domain.

II. SOME FUNDAMENTAL LEGAL PRINCIPLES OF (PERMANENT) TAKINGS

A. *Per Se Rules versus Balancing Tests*

Takings jurisprudence has been long portrayed as a "muddle."[28] It is no wonder. There are so many forms of government interventions with private property: physical or regulatory, temporal or permanent, complete or partial, benign or opportunistic, and so forth, such that it is extremely challenging, both normatively and practically, to draw the line between legitimate government action and a compensable taking.

Trying to address the plethora of incidents of government intervention with private property, the Supreme Court has sought to identify types of actions that are considered per se takings, those that require an ad hoc balancing test to determine whether the action amounts to a taking, and other actions that are viewed as a legitimate exercise of police power or another source of authority (such as the broad constitutional legitimacy awarded to zoning since the 1926 *Village of Euclid* case).[29] While such line-drawing has been often criticized, it serves as a starting point for evaluating the essence of government actions, including temporary takeovers that are the focus of this Article.

Broadly speaking, the Supreme Court has identified, so far, three types of government actions that amount to per se takings. The first two categories described below address permanent physical appropriations, whereas the third category addresses a particular subset of permanent

28. *See, e.g.*, Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

29. Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926).

regulations.

First, under the *Loretto* rule, any form of "permanent physical occupation of another's property" amounts to a taking.[30] While this is obviously the case when the government explicitly exercises its power of eminent domain, it is also valid for other types of permanent occupations of land by the government or by public utilities. Moreover, the *Loretto* rule also applies when the permanent occupation takes place on part of the relevant parcel (such as the TV cable installation occupying only portions of Ms. Loretto's roof and the side of her building).[31] Partial permanent physical takings are also per se takings.[32] The scope of permanent physical occupation out of the whole parcel matters only for calculating the amount of just compensation.

Second, in the *Horne* case,[33] the Supreme Court held that physical appropriation of personal property is a per se taking, and should not be distinguished in this respect from real property. *Horne* dealt with "marketing orders," promulgated by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, to help maintain stable markets for particular agricultural products. The marketing order for raisins established a committee that imposed a reserve requirement, by which growers set aside each year a certain percentage of their crop for the U.S. government, free of charge. The government made use of those raisins by selling them in noncompetitive markets, donating them, or disposing of them by any means consistent with the purposes of the program. If any profits were left over after subtracting the government's expenses from administering the program, the net proceeds were distributed back to the raisin growers.[34]

The Supreme Court held that such a mandatory reserve requirement amounts to physical appropriation and that this constitutes a per se compensable taking. Any net proceeds the raisin growers received from the sale of the reserve raisins went to the amount of compensation they

30. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).

31. *See id*. at 421–22.

32. This does not mean, of course, that partial permanent physical takings may not generate normative and practical difficulties, such as when the partial taking also adversely effects the relative value of the remaining property left for the owner. *See* Abraham Bell & Gideon Parchomovsky, *Partial Takings*, 117 COLUM. L. REV. 2043, 2065 (2017).

33. Horne v. Dep't of Agric., 135 S. Ct. 2419 (2015).

34. In the relevant years, raisin growers were required to set aside between 30 to 47 percent of their crops. *Id*. at 2421.

received for that taking, but it did not mean the raisins were not appropriated. Going back to the history of the Takings Clause, against the backdrop of personal property appropriations during the Revolutionary War, the Court emphasized the "longstanding distinction" between regulations concerning the use of property and those regarding government acquisition of property.[35] Accordingly, the Court noted that while an owner of personal property may expect that a new regulation of the use of property could "render his property economically worthless," when it comes to physical appropriations, people do not expect their property to be actually occupied or taken away.[36]

The first two per se rules address, therefore, permanent physical appropriations. These rules apply even if the taking is partial, such that it covers also permanent takeovers of only part of the actual asset, or when the owner loses title to the property but maintains certain proceeds from it.

Third, under the *Lucas* rule, any permanent regulation "that deprives land of all economically beneficial use" is considered as a compensable taking unless an "inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[37] Citing earlier case law that supports this proposition, the Court in *Lucas* states that while "[w]e have never set forth justification for this rule," this may be simply so because "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."[38]

Needless to say, such an allegedly categorical rule still leaves open many unresolved questions, such as whether it denies a taking claim by those who acquire title in the land after the enactment of a certain regulation, or when the regulation does not apply to the entire parcel.[39] The latter point has been particularly challenging. In the *Penn Central* decision, addressed in more detail below, Justice Brennan noted that "[i]n deciding whether a particular governmental action has effected a taking, this Court focuses . . . on the nature and extent of the interference with

35. *Id*. at 2422 (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 323 (2002)).

36. *Id*. (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027–28 (1992)).

37. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992).

38. *Id*. at 1017.

39. *See* DUKEMINIER, *supra* note 23, at 1084–88.

rights in the parcel as a whole."[40] Identifying the "whole parcel" can prove, however, a tricky task. In fact, ever since the 1922 *Pennsylvania Coal* case,[41] which established the regulatory takings doctrine, courts have tried to address the question of identifying the relevant parcel for a given regulation—e.g., in *Pennsylvania Coal*, regarding whether to distinguish between three separate estates in the mining property: surface, minerals, and support of the surface.[42] The problem of "conceptual severance,"[43] or that of determining the "proper denominator in the takings fraction,"[44] is persistent in the post-*Lucas* era, and is even exacerbated by it, because it may decide if the per se rule would apply. This is so when the value of a certain part of the land (or a certain right thereto) is fully deprived, but the land in its entirety preserves some value, so it is not stripped of "all economically beneficial use."[45] Such complications raise doubts, therefore, about the feasibility of any sort of a per se rule when applied to regulatory takings, which are generally governed by a balancing test adopted in *Penn Central*.[46]

The *Penn Central* decision, and the prongs of its ad hoc balancing,

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40. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130–31 (1978).

41. Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

42. In *Pennsylvania Coal Company*, Justice Holmes stated that the underlying Kohler Act "purports to abolish" the estate in the supports of the surface. *Id*. at 414; Justice Brandeis, however, stressed that the rights of an owner are not increased "by dividing the interests in his property." *Id*. at 419 (Brandeis, J., dissenting).

43. The use of this term in the academic literature is attributed to Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1667, 1674 (1988).

44. Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001).

45. Murr v. Wisconsin, 137 S. Ct. 1933, 1943, 1949 (2017). Thus, for example, in *Murr*, the Supreme Court inquired whether a merger provision in Wisconsin law, by which adjacent lots under common ownership may not be "sold or developed as separate lots" if they do not meet certain size requirements, should be examined by looking at the value diminution of each one of the lots, or of the merged parcel as a whole. *Id*. at 1940. The Court offered a balancing test for deciding this question, including "treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land." *Id*. at 1945. This means that the Court engages in a "step zero" balancing test to decide whether the affected piece of land, or right thereto, stands on its own to then decide whether it was deprived of all economically beneficial use in order to apply the per se rule under *Lucas*. Lynn E. Blais, *The Total Takings Myth*, 86 FORDHAM L. REV. 47, 48–49 (2017); *see also* Steven J. Eagle, *Property Rights and Takings Burdens*, 7 BRIGHAM-KANNER PROP. RTS. CONF. J. 199, 222–23 (2018) (arguing that the balancing test in the *Murr* decision for establishing "the parcel as a whole" test conflates the definition of property rights with the type of regulation imposed on them, and is therefore both conceptually and normatively problematic).

46. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 104 (1978).

referred to *Pennsylvania Coal* as the "leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'"[47] The Court referred also to the *Armstrong* case, according to which the "Fifth Amendment's guarantee [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[48]

When do "justice and fairness" require the exercise of the Takings Clause? The Court in *Penn Central* sought to identify "several factors that have particular significance"[49] in determining when government regulation amounts to a compensable taking. While the Court listed numerous factors without offering a scale or internal priority among such factors,[50] three such considerations have come to be identified as *Penn Central*'s ad hoc three-prong test: "[t]he economic impact of the regulation," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of governmental action."[51] Much has been written about these three prongs, trying to make sense of each one of them and of the internal relations between them, and whether the Court's look at the nature and "extent of the interference with rights in *the parcel as a whole*" should be viewed as an independent prong, or one embedded in the three-prong test.[52]

While conceptually and normatively confusing and vague, the *Penn Central*'s three-prong test and the bottom line of its implementation in subsequent case law have been, practically speaking, clear enough. With the rare exception of a land use regulation "that deprives land of all economically beneficial use" when considering "the parcel as a whole"—with such cases in any way governed by *Lucas*'s per se rule—the *Penn Central*'s ad hoc analysis rarely results in the conclusion that a regulation amounts to a taking. Moving from theory to practice, the *Penn Central*'s ad hoc test has essentially resulted in a "no takings" rule for land use

47. *Id*. at 127.

48. Armstrong v. United States, 364 U.S. 40, 49 (1960).

49. *Penn Central*, 438 U.S. at 124.

50. *See* DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 131–132 (2002) (listing the various factors, and concluding that these factors lack an internal order or clear methodology, such that all "one can say for certain is that the method is *ad hoc*").

51. *Penn Central*, 438 U.S. at 124.

52. Eagle, *supra* note 45, at 208–16 (emphasis added).

regulation.[53]

Thus, broadly speaking, when permanent government measures are concerned, one can see a practical distinction between two per se categories. Permanent physical takings of property, even if partial in scope, are always a taking. Permanent regulation of property is almost never a taking.

B. *Prevention of Public Harm versus Promotion of Public Benefit*

Another type of per se rule that has emerged in early takings jurisprudence, although it has been criticized both in the literature and in subsequent case law, concerns a distinction between government measures that seek to prevent public harms and those that promote a public benefit. A series of early twentieth-century Supreme Court cases suggested that "harmful or noxious uses" of property may be proscribed by government regulation without the requirement of compensation. In the 1915 *Hadacheck* case,[54] the Court upheld an ordinance of the City of Los Angeles banning the operation of a brick yard or brick kiln, or any establishment for the manufacture or burning of bricks within described limits of the City. Hadacheck was the owner of a tract of land that was outside the limits of the City and distant from residential properties when he had purchased it. The tract had a highly valuable bed of clay, and the owner incurred major expenditures to excavate the clay, and erected expensive machinery for the manufacture of bricks. Hadacheck argued that compelling him to abandon his business would deprive him of the use of his property, also because the deep excavations made the land unsuitable for residential purposes.[55]

The Court upheld the ordinance, reasoning that it fell within the City's broad police powers and that a "vested interest cannot be asserted against it because of conditions once obtaining. To do so would preclude development and fix a city forever in its primitive conditions."[56] Emphasizing that "there is no prohibition of the removal of brick clay; only a prohibition within the designated locality of its manufacture into bricks," and that "there is no allegation or proof of other objectionable

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53. *See* James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 45–56 (2016).

54. Hadacheck v. Sebastian, 239 U.S. 394, 404 (1915).

55. *Id*. at 405–06.

56. *Id*. at 410 (citation omitted).

businesses being permitted within the district," the Court validated the City's act as "an honest exercise of judgment upon the circumstances which induced its action."[57]

Hadacheck, and other decisions such as the 1928 *Miller* case,[58] understood as drawing a line between measures aimed at preventing a public harm and those intended to promote a public good, such that the former category is not a taking, have been broadly criticized. Frank Michelman identifies the "basic difficulty with the method of classifying regulations as compensable or not according to whether they prevent harms or extract benefits" in that "such a method will not work unless we can establish a benchmark of 'neutral' conduct which enables us to say where refusal to confer benefits (not reversible without compensation) slips over into readiness to inflict harms (reversible without compensation)."[59] Such line-drawing is hard, conceptually and normatively.[60]

This distinction has been substantially undermined in the *Lucas* case, according to which "the 'harmful or noxious uses' principle" was "the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power."[61] Rejecting the existence of some objective conception of "noxiousness" for purposes of a takings analysis, the Court in *Lucas* noted that "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder."[62] Accordingly, "it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish 'regulatory takings'—which require compensation—from regulatory deprivations that do not require

57. *Id*. at 412–14.

58. Miller v. Schoene, 276 U.S. 272 (1928) (upholding a state regulation requiring that the owners of red cedar trees infected with a red cedar rust, a fungus, cut them down to protect apple orchards that can be killed by this rust).

59. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1197 (1967).

60. Thus, Michelman considers the example of a regulation forbidding the erection of billboards along the highway, and asks, "Shall we construe this regulation as one which prevents the 'harms' of roadside blight and distraction, or as one securing the 'benefits' of safety and amenity?" *Id*.

61. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1022–23 (1992).

62. *Id*. at 1024.

compensation."[63] Per the Court, at any rate, none of the cases such as *Hadacheck* that had "employed the logic of 'harmful use' prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land."[64]

Abandoning the harm-preventing/benefit-conferring distinction, the Court in *Lucas* adopted a different benchmark for deciding whether a regulation that deprives land of all economically beneficial use may nevertheless not require the government to pay compensation to the owner. This would be so "only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[65] Such an inquiry requires the government to point out "the restrictions that background principles of the State's law of property and nuisance already place upon land ownership" prior to the disputed regulation.[66]

While the Court in *Lucas* sought to undermine the harm/benefit distinction, by replacing it with a different concept of "background principles," the Court seems to have consciously conflated the two concepts in the 2001 *Palazzolo* case.[67] Suggesting that the identification of "background principles" in the relevant state law must rely on "objective factors, such as the nature of the land use proscribed,"[68] Justice Kennedy looked, *inter alia*, at "the degree of harm to public lands and resources . . . posed by the claimant's proposed activities." The concept of harm was therefore viewed as an "objective" factor, and not as one that is merely "in the eye of the beholder."

The tension between *Lucas* and *Palazzolo* leaves room for doubt about the current status of the harm-preventing/benefit-conferring distinction in the Court's jurisprudence. That said, I suggest that abandoning this distinction altogether might be counter-productive. This is so because it would inadvertently undermine our ability to assess the true motivations and goals of government in undertaking a certain regulatory step, at least in the sense of identifying the private parties that stand to gain and those that would lose, as compared with the *status quo*

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63. *Id*. at 1026.

64. *Id*.

65. *Id*. at 1027.

66. *Id*. at 1029.

67. Palazzolo v. Rhode Island, 533 U.S. 606, 612–13 (2001).

68. *Id*. at 630 (quoting, interestingly, *Lucas*, 505 U.S. at 1030).

ante, from the regulation.

Thus, for example, even if a certain pre-existing use, such as manufacturing of bricks, is not actionable in private nuisance by adjacent landowners, a normative assessment of the acts or omissions of the relevant parties might serve as a benchmark for identifying the necessity of the regulation, the appropriateness of the means chosen to achieve a certain end, and the normative desirability of the allocation of costs and benefits on the various private parties affected by the government regulation. In some cases, such an evaluation might also assist in deciding whether the government should re-shift at least part of this allocation by paying compensation to the owner.

Generally speaking, a normative inquiry of the nature and scope of the pre-regulation use of the asset, as compared with its post-regulation use by the owner, can include the following two factors.

First, are the external effects of the pre-regulation use of the asset on adjacent owners, or on society at large, an inevitable by-product of an otherwise productive use by the owner? In other words, to the extent that the market value of the asset before the regulation derives from the societal positive value of the underlying activity, and not from a mere "opportunistic value" of holding out vis-à-vis adjacent owners or a public authority, then the existence of external effects can justify regulation intended to mitigate or eliminate them. However, the legitimacy of such a regulation should not disqualify the owner from making a regulatory taking claim under the *Loretto* rule (if the property loses all of its market value) or *Penn Central* rule (if diminution of value is partial).

Second, the legitimacy of the pre-regulation use for purposes of a takings analysis would be particularly strong, even if it has negative external effects on others, when such use is generally typified as falling under the "not in my backyard" (NIMBY) syndrome,[69] and not as a flatly illegal or socially undesirable conduct regardless of time and place. Going back to the *Hadacheck* case, there is no doubt that the manufacturing of bricks is generally a socially desirable enterprise (as is the case with waste disposal facilities, power stations, and other types of NIMBY uses). The problem lies in its specific location, such that the purpose of the regulation is to move this type of action to a different location, but not to eliminate it altogether. This therefore means that while the pre-regulation use can be considered as "obnoxious" or as a

69. For the NIMBY syndrome, see generally Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495 (1994).

"nuisance" to others at a specific location, and this justifies, in turn, regulation that would have the effect of shifting this otherwise productive activity elsewhere,[70] the landowner should not be barred from making a regulatory takings claim if she loses the entire market value (*Lucas*, per se rule) or part of it (*Penn Central*, balancing test).

As I show in Part IV.B, such an analysis may prove particularly useful for temporary takeovers. While in some cases, a temporary takeover should be considered as a compensable taking because the reason for the takeover has nothing to do with the pre-regulation use of the asset, or that such use is "blameless," in other cases a temporary takeover can be grounded in halting a damaging effect resulting from the asset's use, which is not inherent to it, but may still require a temporary intervention by the government. Some types of temporary government interventions, aimed at preventing a public bad during an emergency, should not be considered as a compensable taking.

III. THE CURRENT LANDSCAPE OF TEMPORARY TAKINGS

A. *Physical versus Regulatory Temporary Takings*

This section identifies the current doctrine concerning temporary takings. It highlights the key cases that addressed an explicit temporary use of the power of eminent domain, especially during the Second World War, alongside other cases involving a temporary takeover or another time-limited physical intrusion of private property—and how such other forms of intrusion were viewed more contingently by the courts. This section then addresses temporary regulations, and the development of the doctrine since the initial recognition by the Court of the concept of a temporary regulatory taking in the 1987 *First English* case.[71] It then presents a balancing test for temporary takings developed in the *Arkansas Game and Fish Commission* case,[72] in the context of government flooding of private property, which may be viewed as a distinct category of cases

70. In fact, the legitimacy of shifting otherwise productive uses to their "proper" geographical spaces is what underlies the power of zoning. As the Supreme Court famously stated in the seminal case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926): "A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."

71. First Eng. Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 337 (1987).

72. Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 38–39 (2012).

involving government physical interference with property that nevertheless falls short of full-scale government appropriation for public use.

During the Second World War, and in its aftermath, the U.S. Supreme Court discussed a number of cases in which the federal government took possession of private property for a certain period of time and for certain purposes related to its operation during the wartime emergency.

In *United States v. General Motors*,[73] the U.S. Attorney General instituted in June 1942 proceedings for the condemnation of occupancy of space in a warehouse building in Chicago, which was under a twenty-year lease by General Motors, for a term ending on June 30, 1943.[74] Following a court order, granting the U.S. government immediate possession, General Motors removed its personal property and certain fixtures from the space, and handed it over a few days later. At the end of this term, General Motors was set to reoccupy and use the space until the end of its lease term. While there was no dispute that the temporary condemnation amounted to a taking under the Fifth Amendment, the Supreme Court ruled on the measure of just compensation. It held that General Motors was entitled to payment beyond mere rental value, because of the specific expenditures it made and the damages it incurred, such as destruction of certain fixtures removed from the space.[75]

In *United States v. Petty Motors*,[76] the U.S. government petitioned for condemnation of the temporary use for public purposes of a building in Salt Lake City, Utah. The petition, filed on November 9, 1942, sought to take the use of the building for the government through June 30, 1945. The premises were occupied by various tenants, including Petty Motors, with diverging terms of leases, but none exceeding the end date of the government use. As with the *General Motors* case, the U.S. government did not dispute its duty to compensate the tenants for the remaining term of their lease. However, differently from the *General Motors* case, in which the term of the lease of the petitioner exceeded the term of the

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73. United States v. Gen. Motors Corp., 323 U.S. 373, 374–75 (1945).

74. *Id.* at 374–75. The proceedings were premised in the authority of the U.S. Secretary of War under Section 201 of Title II of the Second War Powers Act of March 27, 1942. 50 U.S.C. app. § 632.

75. For the ruling of the Court on the measure of compensation in this case, see text accompanying *infra* notes 129–34.

76. United States v. Petty Motors Co., 327 U.S. 372, 374 (1945).

temporary government use and thus only part of the lease was taken such that the petitioner was set to reoccupy the premises at the end of the temporary public use, in the *Petty Motors* case, the temporary eminent domain condemned all interests in the leaseholds. Accordingly, the Supreme Court held that just compensation should be based on the market value of the rent for the relevant period, and it should not also include the costs of removal or relocation.[77]

Unlike the above two cases, in *Kimball Laundry v. United States*,[78] the temporary public use was inherently tied to the pre-condemnation use. The U.S. government sought to acquire a right to temporary use and occupancy of Kimball Laundry to provide laundry and dry-cleaning services for members of the armed forces. The petition to condemn Kimball Laundry's plant in Omaha, Nebraska, was filed on November 21, 1942. The property was finally returned on March 23, 1946. Most of Kimball Laundry's 180 employees were retained during that time, and one of the owners stayed on as operating manager. At the same time, having no other means of serving its customers, Kimball suspended business to its clientele for the duration of the U.S. Army's occupancy.[79] As I show in Part III.B below, the affinity between the pre-appropriation and post-appropriation uses impacted the Court's method for evaluating just compensation. This is so because the government's use of the plant as a laundry—while retaining the petitioner's employees for that purpose—appropriated the petitioner's opportunity to profit from its trade routes throughout the period of the government takeover. This required the government to pay the petitioner for its lost profits, reflecting its going-concern value, rather than paying some abstract "fair rental value."[80]

Yet another case of temporary government takeover illustrating an affinity between the pre-appropriation and post-appropriation uses was discussed in *United States v. Pewee Coal*.[81] The respondent was a coal mine operator whose property was allegedly possessed and operated by the U.S. government from May 1 to October 12, 1943, to avert a nation-wide strike of miners. On May 1, 1943, the U.S. President issued an Executive Order, directing the Secretary of Interior "to take immediate

77. *Id.* at 379–81.

78. 338 U.S. 1, 5 (1949).

79. *Id.* at 3.

80. *See infra* text accompanying notes 137–40.

81. 341 U.S. 114, 117 (1951).

possession, so far as may be necessary or desirable, of any and all mines producing coal in which a strike or stoppage has occurred or is threatened . . . and to operate or arrange for the operation of such mines."[82] The Court held that "having taken Pewee's property, the United States became liable under the Constitution to pay just compensation." While "[o]rdinarily, fair compensation for a temporary possession of a business enterprise is the reasonable value of the property's use," the Court ruled that such a measure of compensation was not required in that particular case, and that the United States was properly required to bear that portion of operating losses attributable to increased wage payments made to comply with a War Labor Board decision.[83]

While in all of the Second World War cases discussed above, there was no real controversy about the liability of the government to pay compensation for its temporary use of eminent domain, later cases showed a more cautious approach about automatically labeling any sort of temporary government invasion of private property as a compensable taking. Thus, in a footnote in the *Loretto* case, Justice Marshall reasoned that "[t]he permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical invasion is a taking . . . such temporary limitations are subject to a more complex balancing process to determine whether they are a taking."[84] In so doing, Justice Marshall refers both to intermittent flooding cases, discussed further below, and to other limits on the right to exclude that the Court did not consider as a taking. These instances include the *PruneYard Shopping Center* case,[85] in which the Court upheld a state constitutional requirement in California that shopping center owners permit individuals to exercise free speech and petition rights on their property, under certain reasonable time, place, and manner restrictions.[86] As the Court in *Loretto*, referring to *PruneYard*, noted: "[s]ince the invasion was temporary and limited in nature, and since the owner had not exhibited an interest in excluding all persons [i.e., patrons] from his property, 'the fact that [the solicitors] may have 'physically invaded' [the owners'] property cannot be viewed as determinative."[87]

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82. *Id*. at 115–16.

83. *Id*. at 117–18.

84. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 n.12 (1982).

85. PruneYard Shopping Ctr. v. Robbins, 447 U.S. 74, 88 (1980).

86. *Id*. at 84.

87. *Loretto*, 458 U.S. at 434 (quoting *PruneYard*, 447 U.S. at 84).

That said, the Court re-emphasized later, in the *Tahoe-Sierra* case discussed below, the "distinction between physical takings and regulatory takings."[88] Accordingly, when the government takes physical possession of a property interest to serve a public purpose, "it has a *categorical duty* to compensate the former owner, regardless of whether the interest . . . constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary."[89] Therefore, while *Loretto* might have been understood as subjecting temporary physical appropriation to a balancing test, *Tahoe-Sierra* seems to reinstate a per se rule for recognizing such a measure as a compensable taking, whenever the government "*occupies the property for its own purposes*." This phrasing may still leave room, however, for distinguishing this category from other cases in which the government allows other persons to temporarily invade the property,[90] or when the physical presence of the government falls short of full-scale occupation. This point will be taken further, later in this section, in discussing rules on government flooding.

What about temporary regulations? When would such non-physical forms of intermittent intervention with private property amount to a compensable taking or "inverse condemnation"?

The first explicit consideration by the U.S. Supreme Court of a

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88. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 321 (2002).

89. *Id*. at 322 (emphasis added) (citation omitted).

90. Thus, for example, in the 2019 decision in the matter of *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 524 (9th Cir. 2019), the federal Court of Appeals (Ninth Circuit) held that a regulation in California under the State's Agricultural Labor Relations Act (ALRA), which allows union organizers access to agricultural employees at employer work sites under specific circumstances, does not amount to a per se taking. The court reasoned that the petitioners-employers "have not suffered a permanent physical invasion that would constitute a per se taking because the sole property right affected by the regulation is the right to exclude" and petitioners "do not allege that other property rights are affected by the access regulation." *Id*. at 532–33. Moreover, referring to the U.S. Supreme Court's decision in *Nollan v. California Coastal Commission*, 483 U.S. 825, 832 (1987), the Ninth Circuit held that "[a]s structured, the regulation does not grant union organizers a 'permanent and continuous right to pass to and from such that the Growers' property 'may continuously be traversed.'" *Id*. at 532. In addition, the court reasoned that unlike in *Nollan*, the contested regulation "does not allow random members of the public to unpredictably traverse their property 24 hours a day, 365 days a year." *Cedar Point Nursery*, 932 F.3d at 532. As of the date of the publication of this Article, this case is pending before the U.S. Supreme Court. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 844 (2020).

temporary regulation as potentially a compensable taking was made in the 1987 *First English* case.[91] The appellant was the owner of land on which it operated a campground and a retreat center. Following a flood that destroyed the buildings, Los Angeles County adopted an interim ordinance prohibiting the construction of any building or structure in an interim flood protection area that included the land. Shortly after the ordinance was adopted, the appellant filed suit, alleging that the ordinance denied all use of the land and seeking to recover damages in inverse condemnation.[92]

While the Court did not explicitly decide that the said interim regulation was a taking, it did recognize in principle that a temporary regulation amounting to a taking should be compensable. Referring to its Second World War cases, the Court found "substantial guidance in cases where the government has only temporarily exercised its right to use private property," reasoning that "these cases reflect the fact that 'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[93] This also means that where a temporary regulation amounts to a taking, government is required to "pay the landowner for the value of the use of the land during this period," such that the mere "[i]nvalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause."[94]

While *First English* might have been initially understood as recognizing a per se rule for a temporary regulatory taking, where a certain regulation denies a "landowner all use of his property" during the specific period of time in which the regulation was in force, the Court took a different approach in the 2002 *Tahoe-Sierra* case.[95] It held that

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91. First Eng. Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 307 (1987).

92. *Id*. at 306–08.

93. *Id*. at 318.

94. *Id*. at 319. The Court further emphasizes that "once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain," but nevertheless, "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id*. at 321.

95. Daniel L. Siegel & Robert Meltz, *Temporary Takings: Settled Principles and*

temporary regulations should be generally analyzed under *Penn Central*'s balancing tests to determine whether a temporary taking has occurred.[96] Accordingly, the imposition by the Tahoe Regional Planning Agency (TRPA) of two moratoria, totaling 32 months, on development in the Lake Tahoe Basin while formulating a comprehensive land-use plan for the area, was not a per se temporary taking.

Unlike the reliance on the temporary physical taking cases in *First English* as a source of "substantial guidance" for corresponding cases of temporary regulations, in *Tahoe-Sierra*, the Court seeks to clearly distinguish the two categories. Accordingly, it states that whereas its "jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of per se rules . . . [o]ur regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by 'essentially ad hoc, factual inquiries.'"[97]

In the context of temporary interventions, the Court reiterates the principle by which compensation is due for a physical appropriation per se, even if it applies to only part of the land or when it is temporary. In contrast, the Court rejects the petitioners' attempt to bring the case under the *Lucas* rule by arguing that the 32-month segment of the moratoria can be severed from each landowner's fee simple estate to examine whether this segment's entire value was taken. Reasoning that "[w]ith property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings," the Court notes that the petitioners' "conceptual severance" argument ignores *Penn Central*'s admonition that, in regulatory takings cases, the focus is on "the parcel as a whole."[98]

Per the Court, "[a]n interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest" and "[b]oth dimensions must be considered if the interest is to be viewed in its entirety."[99] Thus, a temporary restriction that "merely causes a diminution in value is not a taking of 'the parcel as a whole,'" such that a "fee simple estate cannot be rendered valueless by a temporary

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Unresolved Questions, 11 VT. J. ENV'T L. 479, 482-83 (2010).

96. Tahoe-Sierra Pres. Council Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302 (2002).

97. *Id*. at 321–22.

98. *Id*. at 331.

99. *Id*. at 332.

prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."[100]

Nevertheless, the Court in *Tahoe-Sierra* considers when such type of temporary public burden "in all fairness and justice, should be borne by the public as a whole."[101] But it rules that concepts of fairness and justice "will be best served by relying on the familiar Penn Central approach."[102] Accordingly, the Court refused to identify a certain period of time beyond which a moratorium should be considered unreasonable and constituting a taking, reasoning that the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim, but with respect to that factor as with respect to other factors, the "temptation to adopt what amount to *per se* rules in either direction must be resisted."[103] In subsequent federal case law, courts also avoided establishing per se rules for temporary regulations that exhibit an "extraordinary delay" or even "erroneous delay" (for regulations overturned by courts as invalid).[104]

In the context of the COVID-19 crisis, courts have largely denied various petitions against temporary eviction moratoria promulgated by cities, states, and the federal government—such moratoria explicitly aimed at preventing the "further spread of COVID-19."[105] These petitions sought to issue preliminary injunctions against such moratoria, with some petitions arguing that the contested eviction moratorium amounts, inter alia, to a violation of the Takings Clause.

In *Baptiste v. Kennealy*,[106] the U.S. District Court in Massachusetts denied such a claim, targeted at a moratorium on evictions and foreclosures enacted by the State of Massachusetts.[107] The court held,

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100. *Id*.

101. *Id*. at 321 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

102. *Id*. at 342.

103. *Id*.

104. *See* Siegel & Meltz, *supra* note 95, at 485–96 (surveying this complex and often inconsistent case law).

105. For the federal moratorium, see Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020) [hereinafter CDC Eviction Moratorium]. On March 31, 2021, the CDC Eviction Moratorium was extended through June 30, 2021. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731 (Mar. 31, 2021).

106. No. 1:20-CV-11335-MLW, 2020 WL 5751572, at *20 (D. Mass. Sept. 29, 2020).

107. Act Providing for a Moratorium on Evictions and Foreclosures During the COVID-

first, that the petitioners are "unlikely to prove that a physical taking occurred when the Moratorium was enacted because plaintiffs voluntarily rented their property to their tenants."[108]

Second, the court held that the plaintiffs "are also unlikely to show that a 'categorical' or 'non-categorical' regulatory taking has occurred."[109] As for a "categorical" regulatory taking under the *Lucas* rule, the court reasoned that "[a]s the Moratorium, and any prohibition on economically beneficial use it imposes, was when enacted only temporary, and plaintiffs do not contend the Act has rendered their properties valueless, no categorical regulatory taking has occurred."[110]

As for the "non-categorial" regulatory taking under the *Penn Central* test, the court concluded that plaintiffs "are not likely to prove that there was a non-categorial regulatory taking."[111] This is so because under the *Penn Central* first factor, concerning the "economic impact" of the moratorium, the court reasoned that plaintiffs "have only been temporarily deprived of income from their property," and the moratorium "temporarily bars plaintiffs from evicting their tenants and from renting their properties to people who will pay them to rent," but such a "temporary delay . . . is not sufficient to constitute a taking."[112] The court acknowledges, however, that the moratorium implicates the *Penn Central* second factor, in that it "does significantly interfere with plaintiff's reasonable investment backed expectations."[113] As for the third factor regarding the "character of the governmental action," the court reasoned that the moratorium is a "public program adjusting the benefits and burdens of economic life to promote the common good."[114] The court thus concluded that the eviction moratorium does not amount to a regulatory taking.[115]

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19 Emergency. H.B. 4647, 191st Gen. Ct. (Ma. 2020).

108. *Baptiste*, 2020 WL 5751572, at *20. Per the court, the moratorium did not compel plaintiffs to "submit to the physical occupation of the land" or to "rent their properties," and the moratorium's provisions fall within the State's "broad power to regulate housing conditions in general and the landlord-tenant relationship in particular." *Id*.

109. *Id*.

110. *Id*.

111. *Id*. at *22.

112. *Id*. at *21.

113. *Id*. at *22.

114. *Id*. (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

115. Other federal courts have also rejected petitions for a preliminary injunction targeted

Finally, one needs to consider a line of cases that may be viewed as constituting a middle category between quintessential temporary eminent domain and temporary regulations, namely cases that involve a temporary governmental invasion of property, but that fall short of full-scale appropriation for public use. These cases often involve a temporary government flooding of land.

In the 2012 *Arkansas Game and Fish Commission* case,[116] the Court held that government-induced flooding, temporary in duration, does not gain automatic exemption from Takings Clause inspection. The petitioner, owner of 23,000 acres that are forested with multiple oak species and serve as a venue for recreation and hunting, suffered considerable damage, such as destruction of timber and substantial change in the character of the terrain, due to a series of seasonal flooding during the period between 1993 and 2000. The flooding was caused by a water control manual of the U.S. Army Corps of Engineers for the release of seasonally varying rates of water from a government-owned dam, located upstream from the petitioner's land. The petitioner alleged that the temporary deviations, causing sustained flooding during tree-growing season, were a taking.[117]

The Court starts by noting that ordinarily, "if government action would qualify as a taking when permanently continued, temporary actions of the same character may also qualify as a taking."[118] Also, in

against local or state eviction moratoria, or against the federal eviction moratorium itself. In *El Papel LLC v. Inslee*, No. 2:20-CV-01323-RAJ-JRC, 2020 WL 8024348 (W.D. Wash. Dec. 2, 2020), the court rejected a preliminary injunction motion targeted against eviction moratoria promulgated by the State of Washington and the City of Seattle. In so doing, the court held that there is no basis for injunctive relief based on a takings claim, in light of the principle set forth in *Knick v. Township of Scott*, 139 S. Ct. 2162, 2176 (2019), by which "[a]s long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking," such that there was also no need to discuss the merits of the takings claim. In *Brown v. Azar*, No. 1:20-CV-03702-JPB, 2020 WL 6364310 (N.D. Ga. Oct. 29, 2020), the court denied a motion for a preliminary injunction against the federal eviction moratorium. The reasoning of the court did not address, however, the Takings Clause, but relied on rejecting the plaintiffs' arguments that the moratorium was "arbitrary and capricious" and that plaintiffs were unconstitutionally denied access to courts. *But see* Alabama Ass'n of Realtors v. U.S. Dep't of Health and Human Services, No. 20-CV-3377-DLF, 2021 WL 1779282, at *6 (D.C. Cir. May 5, 2021) (holding that the Public Health Service Act (PHSA) authorizing the U.S. Department of Health and Human Services to combat the spread of a disease through a range of measures did not encompass nationwide eviction moratorium).

116. Ark. Game & Fish Comm'n v. United States, 568 U.S. 23 (2012).

117. *Id.* at 26–28.

118. *Id.* at 26.

addition to the temporary taking of "outright physical possession," the Court reasons that "[a] temporary taking claim could be maintained as well when government action occurring outside the property gave rise to 'a direct and immediate interference with the enjoyment and use of the land,'" and that "government-induced flooding of limited duration may be compensable."[119]

That said, the Court in *Arkansas Game and Fish Commission* refrains from applying a per se rule for a temporary government action that entails a "direct and immediate interference with the enjoyment and use of the land."[120] At the same time, it does not simply refer to *Penn Central*'s three-prong test. It seems to offer another balancing test for temporary forms of "invasion" or "interference" that are allegedly different from outright appropriation or from mere regulation.

First, the Court suggests that "[w]hen regulation or temporary physical invasion by government interferes with private property . . . time is indeed a factor in determining the existence *vel non* of a compensable taking."[121] Second, it looks at "the degree to which the invasion is intended or is the foreseeable result of authorized government action."[122] Third, it examines "the character of the land at issue."[123] Fourth, it looks at "the owner's 'reasonable investment-backed expectations' regarding the land's use."[124] Finally, the Court notes that the "severity of the interference figures in the calculus as well,"[125] quoting an earlier case by which "[w]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [a taking]. Every successive trespass adds to the force of the evidence."[126]

What emerges, therefore, from the thick body of law on temporary takings? Roughly speaking, the Court seems to divide temporary government acts into three types of broad categories. Physical appropriation of private property by the government—or an authorized

119. *Id*. at 33.

120. *Id*.

121. *Id*. at 38.

122. *Id*. at 39.

123. *Id*.

124. *Id*. (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 618 (2001)).

125. *Id*.

126. *Id*. (quoting Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329–30 (1922)).

public utility—for temporary public use is largely controlled by a per se takings rule. A temporary regulation, even if it blocks all use of the land for a certain segment of time, such as in cases of development moratoria, is governed by *Penn Central*'s three-prong balancing test, while specifically considering "the parcel as a whole" regarding both its geographical and temporal dimensions. A third category that emerges from cases as early as *Causby*,[127] and culminating in the *Arkansas and Fish Commission* case, concerns government acts that have a physical element of temporarily entering the land, or otherwise interfering with the use and enjoyment of the land, without entirely ousting the owner from the land or part of it. Such cases of temporary "invasion" or "interference" are governed by a different balancing test that seems more favorable to owners, as compared with *Penn Central*.

B. *From "Fair Market Value" to "Fair Rental Value"*

How is just compensation measured for temporary eminent domain or for comparable measures that invade the property or interfere with its use and possession such that they constitute a taking?

The basic principle established in the Second World War cases, which dealt with explicit temporary eminent domain, was that the compensation should *not* be based on "fair market value," in the sense of calculating the market value of the property on the date of the taking by the government minus the market value on the date of its return to the owner or leaseholder. The compensation standard relies, rather, on the "fair rental value" of the asset for the said period.[128] This mode of compensation should work in conjunction with the more general principle, reflecting the normative basis of the Takings Clause developed in the context of permanent takings, by which "the owner must be put in as good position pecuniarily as if his property had not been taken."[129] That said, evaluating the rental value of a vacant property, based on comparable transactions, may often prove practically unfeasible and normatively troubling in light of the underlying principles of the Takings Clause. This requires courts to consider other factors in relevant cases.

Thus, in *General Motors*, the Court distinguishes between

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127. U.S. v. Causby, 328 U.S. 256 (1946) (holding that frequent Air Force overflights from a nearby airport resulted in a taking).

128. *See* Kimball Laundry Co. v. United States, 338 U.S. 1, 7 (1949).

129. United States v. Gen. Motors Corp., 323 U.S. 373, 379 (1945).

compensation for permanent takings and that for temporary takings. When government takes the fee, "compensation . . . does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will . . . , or other like consequential losses which would ensue the sale of the property to someone other than the sovereign."[130] The Court justifies this rule in that "all these elements would be considered by an owner in determining whether, and at what price to sell," such that these elements would be inherently represented in the fair market value of the property. While the Court admits that fair market value may nevertheless leave the owner unwhole because certain consequential damages may not be covered, it notes that "[f]or these whatever remedy may exist lies with Congress."[131]

In contrast, the Court asks whether a different measure of compensation is due when the right taken is that of "temporary occupancy of a building equipped for the condemnee's business, filled with his commodities, and presumably to be reoccupied and used, as before, to the end of the lease term on the termination of the Government's use."[132] According to the Court, the "value of such an occupancy is to be ascertained not by treating what is taken from [the condemnee] as an empty warehouse to be leased for a long term," which the government could then artificially chop into bits of time "of which it takes only what it wants, however few or minute" and leave the condemnee "holding the remainder, which may be then altogether useless to him." The measure of a market rent should be, rather, that of "a building on a lease by the long-term tenant to the temporary occupier."[133] This means that fair rental value should consider at least some of the consequential costs or damages that the owner may face, such as the "reasonable cost of moving out the property stored and preparing the space for occupancy by the subtenant"—in light of the assumption that this property will be reinstated in the space by the long-term tenant at the end of the temporary use—as well as the cost of "fixtures and permanent equipment destroyed or depreciated in value."[134]

As already noted in Part III.A above,[135] differently from the *General*

130. *Id*.

131. *Id*. at 379–82.

132. *Id*. at 380.

133. *Id*. at 382.

134. *Id*. at 383.

135. *See supra* text accompanying notes 76–77.

Motors case, in which the term of the lease of the petitioner exceeded the term of the temporary government use, in the *Petty Motor* case, the temporary eminent domain condemned all interests in the leaseholds, because none of the lease terms exceeded the end date of the government use. Accordingly, the Court in *Petty Motor* held that just compensation should be based on the fair rental value for the relevant period, and it should not cover consequential costs, such as those of removal or relocation.[136]

The unique aspects of a temporary eminent domain, under which the right-holder is basically required to wait until government use is over to return to her or his own use of the land, were featured in *Kimball Laundry*,[137] and led to the recognition of lost profits of the condemnee as compensable, based on its going-concern value, rather than paying an abstract "fair rental value."[138] This was so because during the temporary takeover of Kimball Laundry's plant by the U.S. military to provide laundry and dry-cleaning services for its personnel, with most of the condemnee's employees being retained there during that time, the plaintiff practically had to suspend business to its clientele for the duration of the government occupancy.[139] As the Court notes:

> The taking was from year to year; in the meantime the Laundry's investment remained bound up in the reversion of the property. Even if funds for the inauguration of a new business were obtainable otherwise than by the sale or liquidation of the old one, the Laundry would have been faced with the imminent prospect of finding itself with two laundry plants on its hands, both of which could hardly have been operated at a profit. There was nothing it could do, therefore, but wait.[140]

It is therefore not only the temporary nature of the physical taking, but also the affinity between the pre-appropriation and post-appropriation uses that justify the payment of lost profits.

Another way in which the pre-appropriation and post-appropriation uses were intertwined, with consequent implications for calculating just compensation, is manifested in *Pewee Coal*,[141] in which the U.S.

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136. United States v. Petty Motor Co., 327 U.S. 372, 379–81 (1946).

137. Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).

138. *Id*. at 12–13.

139. *Id*. at 3.

140. *Id*. at 14.

141. United States v. Pewee Coal Co., 341 U.S. 114 (1951).

government allegedly possessed and operated a private coal mine. The underlying motive of the temporary takeover was to make sure that the coal mine did not stop operating because of a potential strike over nation-wide, wage-related disputes. The Court held that the seizure of the property was not a mere sham and that the government "took Pewee's property and became engaged in the mining business,"[142] and "[b]y doing so it became the proprietor and, in the absence of contrary arrangements, was entitled to the benefits and subject to the liabilities which that status involves."[143] That said, the facts of the case indicate that Pewee continued to pay the (increased) wages of the miners during that time, and thus probably also received proceeds from selling the coal to the government. Accordingly, the Court found the government liable under the Takings Clause for the amount of $2,241.26, reflecting Pewee's portion of the operating losses it incurred during that time, attributable to the increased wage payments it made to miners in order to comply with a War Labor Board decision.[144] Therefore, without second-guessing the Court's ruling that it was nevertheless the government that operated the mine, the compensation actually reflected the financial outcomes of the temporary public use.

Therefore, although the Court's jurisprudence, including in the *Pewee* case, has been persistent about the principle by which "[t]he measure of just compensation has always been the loss to the owner, not the loss or gain to the Government,"[145] temporary takings may undermine this distinction, especially when the pre-appropriation and post-appropriation uses are intertwined.

In Part IV, I argue that the conflation of the owner's loss and the public value not only arises practically in temporary takings, but it may also be desired normatively. This is so especially when the government's decision to take over an asset for a certain period of time, while engaging in the same type of use made by the owner prior to the appropriation, prevents the owner from otherwise engaging in a profitable activity, or if it can be seen as opportunistic or driven by rent-seeking.

142. *Id*. at 116–17.

143. *Id*. at 118–19.

144. *Id*. at 117.

145. *Id*. at 121 (Reed, J., concurring).

IV. RECONCEPTUALIZING TEMPORARY EMINENT DOMAIN

A. *Temporary Takeovers: Between Urgent Actions and Wait Periods*

When would government typically engage in a temporary takeover of private property? As the previous parts already showed, this may happen in a wide variety of cases. Broadly speaking, it seems that most of these instances fall into two major categories, which are interestingly juxtaposed, at least on the face of it. One category of cases deals with various types of emergency situations, in which government urgently needs to use the property to promote a pressing public goal. The other category is that of "wait periods," when a certain private property cannot be developed or otherwise used productively by the owner, and the government wishes to take advantage of such a hiatus to promote another, temporary public use for the asset. Although these two categories depart from essentially opposite starting points, they can and should be conceptualized under a single framework to establish a legal taxonomy of when would temporary takeovers be considered a taking, and what should be the measure of compensation in such cases.

As for emergency situations, the previous parts highlighted the use of temporary eminent domain during national-defense emergencies, as well as during the COVID-19 health crisis. But other types of emergencies exist, and these may also require temporary takeovers. This is the case with natural disasters, such as fires, floods, or earthquakes. While *First English* dealt with a temporary ordinance prohibiting construction in an interim flood protection area, in other cases the public intervention with private property might be more active and more aggressive.

In *Trinco Investment Company*,[146] landowners brought action alleging that the U.S. government took their merchantable timber when the United States Forest Service intentionally lit fires in order to manage a group of wildfires. This case, which is still pending, will be discussed further in Part IV.C in light of the government's argument that the case entails the "doctrine of necessity," by which it is absolved of liability under the Takings Clause for destruction of property in cases of actual necessity to prevent or forestall grave threats to the lives and property of others.[147]

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146. Trinco Inv. Co. v. United States, 722 F.3d 1375 (Fed. Cir. 2013).

147. The case is currently pending before the U.S. Court of Federal Claims, after it rejected

Yet another type of emergency situation, which may call for a temporary takeover of private property, has to do with preserving public order and fighting crime. In *Nat'l Bd. of YMCA*,[148] U.S. troops protecting the Panama Canal Zone occupied a YMCA building for one night during a battle with rioters, after the building had been wrecked by a mob. Following the troops' arrival, the rioters set it afire. The Supreme Court rejected a taking claim against the government, reasoning that "the temporary, unplanned occupation of petitioners' buildings in the course of battle does not constitute direct and substantial enough government involvement to warrant compensation under the Fifth Amendment."[149] This case will also be analyzed further in Part IV.C.

But then there is another line of cases, one which is typified by the opposite of an emergency. Government use of public property can also be done during "wait periods," in which the private owner is either practically or legally prevented from using her or his property, and the government is interested in promoting a certain temporary public use. This applies, therefore, not only to regulatory public control of property during such wait period, such as in the case of development moratoria discussed in the *Tahoe-Sierra* case, but also to direct physical use by the government.

One set of cases concerns temporary easements acquired through eminent domain for infrastructure projects, such as construction or reconstruction of highways, railways, and subways. In addition to permanent easements, government may temporarily take over private land abutting the public infrastructure as a temporary workspace or for ingress and egress points during the construction period. The scope of the temporary eminent domain, and the required amount of just compensation, would be specifically impacted by whether such a temporary takeover denies the owner, legally or practically, access to the rest of the property and to nearby sidewalks or roads.[150]

Next, consider the use of urban vacant lots for temporary public uses.

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the plaintiffs' motion to move the claim to an Article III District Court. *See* Trinco Inv. Co. v. United States, 140 Fed. Cl. 530 (2018).

148. Nat'l Bd. of YMCA v. United States, 395 U.S. 85 (1969).

149. *Id.* at 93.

150. *See, e.g.*, State, by Comm'r of Transp. v. Elbert, 942 N.W.2d 182 (Minn. 2020) (holding that under Minnesota law, a temporary easement over private land should not be viewed as denying the owner's distinct property right of access to and from abutting highways during the construction period, unless government explicitly denies such access as part of its condemnation proceedings, and therefore not granting compensation for this element).

Large U.S. cities typically have over 15 percent of land that is vacant or abandoned. This is so for a variety of reasons, such as shifts from industrial to service economy, suburban migration, disinvestment in infill property, irregular shape or small size of remnant parcels, parcels reserved for future sale or development by private investors or public utilities, and weak economic cycles.[151] Weak cycles may be the result of a particular crisis, such as the impact that the coronavirus had on retail vacancies,[152] but cycles are part of a larger and systematic phenomenon in real estate.[153] When private properties stand vacant or are otherwise underutilized during a weak cycle or a wait period, this may create an opportunity for utilizing the property for a temporary public use.

Such temporary use of either public or private land is a pervasive phenomenon. In some cases, this may be the result of spontaneous action, such as a grassroots establishment of a community garden or informal park by residents.[154] In other cases, the temporary use may be organized by the city or, at least, coordinated with it. This could be so in establishing certain types of public spaces or in holding periodic or seasonal events, such as a farmers' market, music performances and other outdoor events, or art exhibitions in abandoned buildings.[155] The potential embedded in temporarily exploiting such vacant lots or buildings for serving timely needs, fostering a sense of community, and even promoting broader goals such as environmental or social justice, has prompted calls to systemize such temporary uses as part of a novel land-use planning approach.[156]

How is such public temporary use enabled in private land? In many cases, this would be the result of a consensual arrangement between the owner and the local/state government, often in collaboration with other actors interested in promoting the temporary public use, such as in the

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151. Jeremy Németh & Joern Langhorst, *Rethinking Urban Transformation: Temporary Uses for Vacant Land*, 40 CITIES 143, 144 (2014).

152. Leticia Miranda, *What Happens to Main Street When Even the Biggest Retailers Can't Pay Rent?* NBC NEWS (May 6, 2020, 6:38 PM), https://www.nbcnews.com/business/business-news/what-happens-main-street-when-even-biggest-retailers-can-t-n1200781.

153. *See* William C. Wheaton, *Real Estate "Cycles": Some Fundamentals*, 27 REAL EST. ECON. 209 (1999).

154. *See* Amnon Lehavi, *Property Rights and Local Public Goods: Toward a Better Future for Urban Communities*, 36 URB. LAW. 1, 33–41 (2004) (describing the grassroots growth of such spontaneous spaces across New York City).

155. Németh & Langhorst, *supra* note 151, at 143.

156. *See generally* PETER BISHOP & LESLEY WILLIAMS, THE TEMPORARY CITY (2012).

case of music festivals, pop-up markets, or outdoor sports events.[157] While such arrangements are pervasive in urban vacant lots or underutilized buildings, this could be so also in rural areas.[158]

Can a local or state government pursue such a temporary use against the will of the owner of the vacant lot or building? Obviously, government can resort to its general power of eminent domain, with the use of such power for a temporary purpose validated in the Second World War cases. At the same time, adhering to the regular and often lengthy procedures of eminent domain can prove a daunting task, as courts are unlikely to streamline the process for taking over private land for a temporary public use during a wait period, unlike in the case of an urgent public use.

Some legal systems address such types of takeovers by creating a statutory mechanism for taking over vacant lots for specific public purposes, such as temporary gardens or parking lots.[159] Interestingly, such legislation may not even view such a takeover as a taking, requiring the government to carry the costs of maintaining the lot and to restore it to its previous position at the end of the temporary use, but not mandating to pay just compensation for the actual takeover.[160]

In contrast, it is likely that under the U.S. legal system, following the *Loretto* rule and Second World War cases, such a nonconsensual temporary public use of a vacant lot or abandoned building would be considered a taking. The interesting question may lie, however, in evaluating just compensation, as this may not only pose practical questions, but could also entail broader normative considerations in

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157. *See Temporary Urbanism: Alternative Approaches to Vacant Land*, EVIDENCE MATTERS, Winter 2014, at 28.

158. In the context of rural land, consider, for example, arrangements for a temporary nature conservation of wildlife in return for a "safe harbor guarantee" by which the owner would not be required to undertake additional conservation measures. *See* A.M. Trainor et al., *Evaluating the Effectiveness of a Safe Harbor Program for Connecting Wildlife Populations*, 16 ANIMAL CONSERVATION 610 (2013).

159. *See, e.g.*, Local Governments Act (Temporary Use of Vacant Lots), 5747-1987, SH No. 1207 p. 43 (Isr.) (authorizing local governments to take over vacant lots for gardening or parking lots for a period of up to five years, but limiting such use so that it would automatically expire when the owner is granted a permit to develop the lot).

160. *See, e.g.*, RCA 2896/06 Rosenzweig v. City of Tiberias (Isr. S. Ct. Sept. 18, 2006) (in Hebrew) (commanding the law as serving the interests of both sides, such that the local government takes up the chore of maintaining the lot, instead of it lying derelict, while allowing the public to enjoy it, and finding no source in the underlying Act for compensating the owner for an order issued under the Act).

legally conceptualizing this variety of temporary eminent domain.

On the face of it, the government could argue that the owner suffers no actual loss or damage as a result of a temporary public use of a vacant lot or abandoned building because the owner cannot otherwise put the asset to a productive use. Moreover, such an owner allegedly stands to gain from the fact that the government maintains the property, rather than having the lot or building lying derelict and potentially attracting undesirable informal uses, such as drug abuse or prostitution.[161] To further analogize from *Loretto*, one should recall that on remand, the New York Court of Appeals empowered a statutorily-created commission to set up compensation,[162] and the commission held that nominal compensation of $1 was sufficient because the presence of cable TV usually increases the building's value.[163] If this is so, then even if a coerced temporary public use of a vacant lot is considered a taking, compensation would be regularly set at $1 or so, based on the traditional focus on the loss of value to the owner. If this is so, this could inadvertently incentivize the government to act in an opportunistic manner in promoting temporary public uses, especially when the vacancy stems also from a regulatory hiatus or delayed process of rezoning.

I suggest that such temporary public use of vacant lots or abandoned buildings require a different approach, both practically and normatively. Such use of temporary eminent domain might require establishing just compensation based on the post-appropriation temporary public use. This could definitely draw on consideration paid in consensual arrangements between owners and governments about such uses. But otherwise, such compensation could seek to grant a certain portion of the use value embedded in the temporary public use, especially to the extent that the temporary public use is otherwise commercialized, as is the case with farmers markets, outdoor concerts, etc. Methods of evaluation for market values of public or private assets used for certain public purposes, such as infrastructure or recreation, are familiar in the practice of local, state, and federal governments.[164] These methods could be adjusted to assess

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161. Such a phenomenon is very pervasive for both vacant lots and abandoned buildings. *See* Lehavi, *supra* note 154, at 4, 68.

162. Loretto v. Teleprompter Manhattan CATV Corp., 446 N.E.2d 428 (N.Y. 1983).

163. Loretto's appeals about this decision were denied by the various courts as non-appealable. *See, e.g.*, Loretto v. Grp. W Cable, Inc., 488 S. Ct. 827 (1988).

164. *See, e.g.*, Richard J. Roddewig & Gary R. Papke, *Market Value and Public Value: An Explanatory Essay*, 61 APPRAISAL J. 52, 62 (1993) (arguing that while "public value" concepts cannot represent a substitute for the market when setting up levels of acceptable exchange

the value of temporary segments of such public uses, and to allocate a certain portion of it as compensation to the owner. Yet another source for doing so could be an analogy to the mechanism of royalties paid to owners of patents in cases of compulsory licenses, an issue I address in Part IV.D below.

B. *Reappraising the Public Harm/Public Benefit Distinction*

As shown in Part II.B, the harm-preventing/benefit-conferring distinction may prove difficult in examining whether a certain permanent governmental measure amounts to a taking. In this section, I suggest that such a distinction might make more sense, both practically and normatively, in the context of temporary takeovers. This would generally mean that certain types of emergency measures, aimed at halting or mitigating a certain type of "public bad" happening at a certain point in time, and which is not inherent in the regular use of a certain asset, should not be considered a taking. This would be so even if such an emergency measure involves a physical governmental invasion, and temporary denial of possession from the owner, to the extent that such an act is reasonably required to prevent certain abnormal effects that may have broader-based implications. The case for not recognizing such temporary measures as a taking would be particularly strong when the damages or losses caused to the owner are in themselves temporary or otherwise reversible when the harm-preventing physical appropriation comes to an end. Such an approach draws on the more general doctrine of necessity that exempts governments from takings liability.

Consider lockdowns and curfews imposed worldwide, and particularly in the United States, during the COVID-19 crisis. Land uses that are regularly considered socially beneficial, from retail to sports events (although they may entail some externalities, such as noise or traffic congestion, even during regular times), embed a particular risk to public health during this specific point in time. This is so not because owners of such businesses intentionally engage in a normatively objectionable behavior, but because the use and possession of the property carries a temporary risk of interpersonal contagion. This may be so also for residential buildings. Across the world, governments have considered the use of coercion to evacuate residents from their homes in

among the private individuals who make up the real estate market, the valuation of public resources is still helpful in making informed public decisions). I suggest that this approach can be utilized in the case of temporary eminent domain applied to temporary public use of vacant or abandoned lots.

"red zones" of coronavirus contagion.[165]

Generally speaking, the temporary takeover of assets that may pose a particular hazard at a certain point in time, to both owners and surrounding properties and persons, should not be considered a taking. By the term harm, I do not refer here to the kind of negative externalities that result from the incompatibility of adjacent uses in what is otherwise a socially or economically desirable activity, but to hazards to persons or property that result from an inherently dangerous situation, such as a natural disaster, epidemic, criminal activity, or armed conflict. Such a view holds valid even if there is no fault on the part of the owner of the asset, such that she or he is also a victim of unfortunate circumstances. In the case of permanent damages caused to the property owner as a result of the temporary takeover, the government would have to meet the threshold of the public necessity doctrine, discussed below. When the costs or damages are temporal—such as loss of revenues or the need to carry expenses for a substitute facility during the term of the takeover—government should probably be held to a lower standard to be exempted from liability.

Under the public necessity doctrine, government is absolved of liability for the destruction of real and personal property, in cases of actual necessity, to prevent or forestall "grave threats to the lives and property of others."[166] Such a necessity was recognized in the context of demolishing a building to stop fire from spreading although the fire did not first break out in those premises,[167] or the destruction of oil facilities in a U.S. military operation.[168]

In the abovementioned *Trinco Inv. Co.* case,[169] dealing with a takings claim against the U.S. government for destruction of plaintiffs' timber due to fires lit intentionally by the U.S. Forest Service to manage a group of wildfires (a practice known as "back burning"), the U.S. Court of

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165. *See, e.g.*, Jeremy Sharon, *Efforts to Remove Sick from Bnei Brak Intensify*, JERUSALEM POST (Mar. 31, 2020), https://www.jpost.com/israel-news/efforts-to-remove-sick-from-bnei-brak-intensify-622973 (reporting on efforts by the Israeli government to remove infected residents from their homes in the City of Bnei Brak, which had a particularly high rate of contagion, and move them temporarily to specially designated hotels).

166. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 n.16 (1992).

167. Bowditch v. City of Boston, 101 U.S. 16 (1879).

168. United States v. Caltex, Inc., 344 U.S. 149 (1952).

169. Trinco Inv. Co. v. United States, 722 F.3d 1375 (Fed. Cir. 2013); *see also supra* text accompanying notes 146–47.

Appeals of the Federal Circuit held that the necessity defense requires case-specific proof of an "actual emergency with immediate and impending danger."[170]

The U.S. Court of Federal Claims held on remand that if the prerequisites of "actual emergency" and "immediate and impending danger" are met, "the court turns to the 'actually necessary' component of the necessity defense," analyzed on a "case-by-case, fact-specific basis."[171] Such necessity "will be measured at the time of the actual emergency and imminent danger, not in hindsight, and must take into account the information available" to the government agency at that time.[172] Finally, "the fire-fighting decisions of the agency which damaged private land must have been reasonable under the circumstances."[173] Importantly, a reasonableness requirement is viewed as placing a lower threshold than requiring that there be only "one feasible option" to act to prove actual necessity. Rather, the destruction of private property should have a reasonable basis to meet the test of necessity, such that "at the time of the emergency the course of action chosen by the government was a reasonably tailored response to imminent danger under the circumstances."[174]

The harm-preventing/benefit-conferring distinction does seem, therefore, to make sense, at least in certain scenarios of emergency-based temporary takeovers, including those involving an actual occupation of property, as is also learned from the U.S. Supreme Court's decision in *National Board of YMCA*,[175] discussed in Part IV.A., according to which "the temporary, unplanned occupation of petitioners' buildings in the course of battle does not constitute direct and substantial enough government involvement to warrant compensation under the Fifth Amendment."[176]

If this is the case when the damages caused by the necessary

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170. *Trinco Inv. Co.*, 722 F.3d at 1379.

171. Trin-Co Inv. Co. v. United States, 130 Fed. Cl. 592, 601 (2017).

172. *Id.*

173. *Id.*

174. *Id.* at 599–600. For the argument that the emergency exception should also apply, in appropriate cases, to economic emergencies, see Nestor M. Davidson, *Nationalization and Necessity: Takings and a Doctrine of Economic Emergency*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 187 (2014).

175. Nat'l Bd. of YMCA v. United States, 395 U.S. 85 (1969).

176. *Id.* at 93.

temporary takeover are permanent, the threshold for government exemption from takings liability should be set at a much lower point when the damage or loss is also temporary in nature. Therefore, if the damage caused to an owner of a certain asset, taken over for a necessary temporary public use to avoid a public danger, comes down to temporary costs of relocation, this loss should not be considered inherently compensable.

The case would be different, however, when the underlying property taken over temporarily by the government does not pose in itself a public danger, or is not otherwise related to preventing such harm for nearby assets, but is used as part of a broader attempt to remedy such potential harm.

Therefore, a government's decision to commandeer private property, such as hotels or convention centers, in order to accommodate coronavirus patients, persons required to stay in quarantine, homeless people, or medical first responders should be considered a temporary eminent domain. This is so because, unlike in public necessity cases, there is no direct link between the specific piece of property and the imminent public danger (other hotels can be equally commandeered).

Somewhat similarly, the various federal, state, and local eviction moratoria enacted during the coronavirus crisis, with the explicit purpose of preventing the "further spread of COVID-19"—as discussed in Part III.A[177]—rely on a more general, broad-based nexus between protection of tenure of renters and alleviating the harms of the COVID-19 pandemic. As explained by the Centers for Disease Controls and Prevention (CDC) in the order setting up the federal eviction moratorium:

> In the context of a pandemic, eviction moratoria—like quarantine, isolation, and social distancing—can be an effective public health measure utilized to prevent the spread of communicable disease. Eviction moratoria facilitate self-isolation by people who become ill or who are at risk for severe illness from COVID-19 due to an underlying medical condition. They also allow State and local authorities to more easily implement stay-at-home and social distancing directives to mitigate the community spread of COVID-19. Furthermore, housing stability helps protect public health because homelessness increases the likelihood of individuals moving into congregate settings, such as homeless shelters, which then puts individuals at higher risk to COVID-19.[178]

Therefore, the harm-prevention rationale embedded in the eviction

177. *See supra* text accompanying notes 114–15.

178. CDC Eviction Moratorium, *supra* note 105.

moratoria *does not* result from the specific traits of a piece of property, or from the harm it may cause to the public safety. It relies, rather, on a broader-based yet much looser nexus between properties and harm-prevention.

That said, there is an underlying difference between the government's physical takeover of private property to accommodate persons—and by so doing preventing a broad-based harm—and the legal consequences of the temporary eviction moratoria. As explained by the court in *Baptiste v. Kennealy*,[179] the eviction moratoria cannot be conceptualized as a physical taking because the "plaintiffs voluntarily rented their properties to their tenants,"[180] and the temporary limit on the ability to evict tenants can be viewed as a form of a (temporary) regulation of landlord-tenant relationship that falls within the broad regulatory powers of the government. Accordingly, these eviction moratoria, as originally crafted, should not be considered as a temporary eminent domain.

C. *Non-Instrumental Violations Resulting from Temporary Takeovers*

Although the general measure of just compensation for a taking, in the regular case of a permanent taking, is payment of "fair market value," takings jurisprudence has always looked more broadly at the entire scope of injuries that may be caused to persons from such a coercive act by government. An inquiry into the various types of subjective and objective dimensions of the violations of property rights,[181] and the injuries that such violations may cause, is important in order to evaluate, as a matter of legal policy, which types of government interventions with private property should be considered compensable takings, and if so, what should be the proper measure of compensation. This section examines how temporary eminent domain may be distinguished from permanent eminent domain, in the context of identifying such non-instrumental violations.

A key feature of non-instrumental injuries that may occur in the case of governmental coercion in the form of a physical takeover is an injury

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179. No. 1:20-CV-11335-MLW, 2020 WL 5751572, at *20 (D. Mass. Sept. 29, 2020).

180. *Id.* at *20.

181. I do not address here the question of whether just compensation should generally seek to make the condemnee whole from her subjective perspective, and if so, how such a result can be practically achieved in designing rules on compensation. *See* Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239 (2007).

to a person's autonomy or liberty.[182] This is particularly so because the initial justification for creating a system of private property rights lies predominantly in entrenching a sense of personal autonomy and "negative liberty,"[183] a sphere of non-intervention. A coercive takeover of privately-owned assets may violate this core feature.[184]

Moreover, the right of ownership can be viewed as focusing on the owner's right or power to "set the agenda" for the underlying asset,[185] such that denying the owner of this right entails an injury that goes beyond the mere loss of economic value that may result from a coercive takeover.[186] This may also explain why it is important, as a normative matter, to identify a taking even in cases, such as in *Loretto*, in which the actual damage is evaluated at $1,[187] or even in cases in which the infringement of the right "arguably increased the value of the property at issue."[188]

Frank Michelman has famously identified "demoralization costs" that may result from a taking in certain contexts.[189] Arguably, such costs are presented in utilitarian terms, such that they reflect

> (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production . . . caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that that they themselves may be subjected to similar

182. *See, e.g.*, Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. STATE L. REV. 957, 966–67 (2004).

183. On "negative liberty," see ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118 (1969).

184. *See* Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 109–10 (2006) (describing this type of injury of insult as a "dignitary harm").

185. Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 278 (2008).

186. This view is embedded in what I consider to be a broader-based principle, one of a "right/value distinction," by which property law shields legally recognized *rights* in regard to assets and does not protect economic value against government-inflicted losses independently of identifying an injury to a legal right. AMNON LEHAVI, THE CONSTRUCTION OF PROPERTY: NORMS, INSTITUTIONS, CHALLENGES 33–38 (2013).

187. *See supra* text accompanying notes 162–63.

188. Phillips v. Wash. Legal Found., 524 U.S. 156, 169–70 (1998).

189. Michelman, *supra* note 59, at 1214–18.

treatment on some other occasion.[190]

That said, it seems clear enough that identifying such costs also entails a moral perception that is correlated with notions of fairness.[191]

This is especially so in light of the circumstances under which condemnees may particularly experience such demoralization costs, such as when the condemnation is viewed as an arbitrary or capricious redistribution; if the burden imposed on a person or small group is a "rare or peculiar one" such that similar burdens are not scattered across the community; if there is no implicit reciprocity of burdens coupled with benefits; or if the members of the class burdened by the measure were unable to wield enough effective influence in the process leading to its adoption.[192] As for the latter point, other scholars have identified a particular subset of "dignity takings" where the confiscation of property involves the dehumanization or "infantilization" of the dispossessed.[193]

The theoretical analysis of non-instrumental injuries resulting from government takeovers of private property is supported by a growing body of studies on popular opinion and psychological experiments about the circumstances under which persons feel particularly averse to such actions, concerning both the legitimacy of the condemnation and the compensation that should be paid.[194] In the context of this Article, two observations are particularly relevant for assessing the ways in which temporary eminent domain may be perceived differently from permanent eminent domain.

Under one set of studies, the particular public purpose for which private property is taken influences the degree of legitimacy that persons attribute to using the power of eminent domain, such that taking land to build a road is considered more legitimate than for a construction of a

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190. *Id*. at 1214.

191. *See id*. at 1218–24 (analyzing such injuries based on John Rawls's concept of "justice as fairness").

192. *Id*. at 1217–18. I do not address here mirror-image situations, in which owners, during times of emergency or distress, might be actually interested in government intervention, or "bail out," such that government takeovers might also possess "morale benefits." *See* Nestor M. Davidson, *Property's Morale*, 110 MICH. L. REV. 437, 471–76 (2011).

193. *See* Bernadette Atuahane, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework for Understanding Involuntary Property Loss and the Remedies Required*, 41 L. & SOC. INQuiry 796 (2016).

194. *See* STEPHANIE M. STERN & DAPHNA LEWINSOHN-ZAMIR, THE PSYCHOLOGY OF PROPERTY LAW 55–70 (2020).

shopping mall,[195] especially because the latter use may result in transferring wealth to other private parties (a notion that mobilized popular and political action in the aftermath of the *Kelo* case).[196]

Yet another set of studies links the length of ownership by the condemnee with reactions to the use of eminent domain, showing a strong relationship between the length of tenure and opposition to the taking, such that taking land owned by the same family for 100 years is viewed as less legitimate and as requiring more compensation than the taking of property owned for two years.[197] That said, no study so far addressed differences between more intermediate terms of ownership.

What can be learned from the theoretical insights about non-instrumental injuries, and the empirical studies examining the particular reasons for using the power of eminent domain and the temporal element, about potential differences between permanent and temporary eminent domain?

At first glance, the typical scenarios in which temporary eminent domain takes place, as portrayed in Part IV.A, and the temporal nature of the physical takeover by government, may point to a lesser degree of non-instrumental injuries as compared with permanent physical takeovers. If so, this difference can influence our normative assessment of whether a temporary physical takeover amounts to a compensable taking, and even if so, what compensation should be paid.

Starting with the reasons for using the power of eminent domain, one can argue that emergency measures requiring temporary physical takeover of private property might be considered more legitimate by both owners themselves and "other observers" (in Michelman's terminology),[198] because times of emergency require us to think "outside the box" and do whatever it takes to prevent imminent danger. This would be so even if the emergency situation, and measures taken, are not carefully scrutinized under the "public necessity" doctrine. To the extent that the temporary takeover of a certain private property seems reasonable

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195. Logan Strother, *Beyond* Kelo*: An Experimental Study of Public Opposition to Eminent Domain*, 4 J.L. & CTS. 339, 352 (2016).

196. Kelo v. City of New London, 545 U.S. 469 (2005). For further discussion of the *Kelo* case, see *infra* Part IV.E.3.

197. Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. EMPIRICAL LEGAL STUD. 713 (2008).

198. Michelman, *supra* note 59, at 1214.

in itself and is not considered ab initio arbitrary, the need to sacrifice one's property interests to prevent or alleviate an imminent public harm, such as a threat to human health and safety, might be viewed as an inevitable result. At the other end, when one considers temporary takeovers during "wait periods," such as a temporary use of a vacant lot as an informal public park, the argument for not recognizing such a takeover as a full-fledged case of eminent domain might be based on the notion that the owner suffers no loss.

As for the time element, although the above-cited experimental studies addressed the impact of the length of the pre-appropriation tenure on the legitimacy of the taking and the required amount of compensation, a similar argument could allegedly be made about the limited period during which the asset is taken over for public use, after which it is restored to the owner. If this is the case, the analysis of temporary takeovers should be distinctive from that of permanent takeovers, being generally more lenient to the government in identifying takings and just compensation.

But is this always the case? I submit that it is not. At least as far as non-instrumental injuries are concerned, there could be cases in which the nature of the government act, and the particular timing chosen for it, might be viewed as opportunistic. This could be so when the value of the asset is particularly high during a certain point of time, such that its takeover by the government during that period should be viewed through more than just a technical segmenting of time. This can be so also when the loss that the owner accrues might have longer-term impacts because of the particular type of asset and the ways in which reputation, clientele, or business opportunities may be lost (consider again the impact of the temporary eminent domain on Kimball's going-concern value[199]). Not all segments of time, and not all types of assets, are equal in this respect. Some tend to be more time-sensitive than others. In some cases, timing is everything, and this should not be disregarded in evaluating whether a certain takeover is a taking and how it should be compensated, not only for instrumental losses, but also for non-instrumental injuries resulting from the taking.

In this sense, opportunistic behavior by the government in choosing the timing of the temporary takeover, and even more so the type of temporary public use for which the asset is taken over, might have a particular bearing on such non-instrumental injuries. For example, to the

199. Kimball Laundry Co. v. United States, 338 U.S. 1, 14 (1949).

extent that a temporary use of a vacant lot for a certain public use can be viewed as motivating the government to otherwise use its regulatory power to forestall rezoning plans or withhold building permits, then the temporary nature of the takeover can be seen as no less abusive than a permanent takeover.

For temporary takeovers during times of emergency, an owner might experience non-instrumental injuries when there is an affinity between the pre-takeover and post-takeover uses. This could be so, for example, when government takes control of a factory that produces medical equipment, such as ventilators or masks, at a particular point in time when worldwide demand for such products is skyrocketing, and government then exports such products to global markets. If this is the case, the temporality of the use may be considered no less or even more opportunistic and annoying, than in cases of permanent takeover that exhibit wealth-redistribution dynamics.

This is yet another reason why a systematic reexamination of temporary eminent domain should look at the potential affinity between pre-takeover and post-takeover uses for deciding whether a particular temporary takeover amounts to a taking. Moreover, in the case of such an affinity, compensation might also be based on the value of the post-takeover public use in calculating the "fair value." On both points, the next section offers an analogy to compulsory licenses for patents.

D. *Lessons from Compulsory Licenses for Patents*

A systematic analysis of temporary eminent domain can benefit considerably from the study of compulsory licenses for patents. As this section shows, when the government takes a license to use an otherwise protected patent, the exercise of such a power is viewed by courts as analogous to,[200] or even as a direct application of, the power of eminent domain under the Takings Clause.[201]

Moreover, it should be noted at the outset that in exercising discretion about the proper method of compensation, courts prefer a "reasonable royalty" approach over a "lost profits" one, which means that compensation is based to some degree on the value of the compulsory license to the government. As I argue throughout the Article, although just compensation for eminent domain usually disregards the value of the

200. 3rd Eye Surveillance, LLC v. United States, 133 Fed. Cl. 273, 276 (2017).

201. Standard Mfg. Co. v. United States, 42 Fed. Cl. 748, 756 (1999).

post-appropriation use as a basis for determining compensation, such a method may make sense both normatively and practically for temporary eminent domain. This is especially so when the choice of timing for the temporary government use points to a particularly significant public value during this segment and when there is an affinity between the pre-appropriation and post-appropriation uses, as is typically the case with compulsory licenses.

The basic tradeoff in patent law between incentivizing innovation and granting public access to the benefits of such knowledge, while enabling further innovation, lies in a temporary monopoly. During the twenty-year term of the patent, the owner enjoys exclusive rights to the invention and can set the price at which products are sold. At the end of the term, the knowledge is released to the public domain.[202] The protection of patents may entail, however, high societal costs. This would be so, for example, when owners of patents in "upstream" biomedical research withhold their consent to grant licenses for purposes of "downstream" product development, especially when such a development requires the integration of many pieces of patented knowledge. The monopoly embedded in patents can thus generate high societal costs and even cost human lives.[203]

Compulsory licenses are a legal mechanism aimed at intervening in the monopoly of the patent owner in extraordinary circumstances, when the costs of the monopoly may be particularly grave. Such a coercive measure, by which a license is granted to another private party or to government itself, denies the owner the general right to exclude others and to set the prices for licenses. A compulsory license is essentially temporary. It might be granted for a specific period of time, but at any rate, it will become redundant at the end of the twenty-year period of patent protection. Yet obviously, from the patent owner's perspective, if the compulsory license runs throughout the remaining period in which a patent is in force, such appropriation becomes practically permanent.

While the U.S. legal system does not have a general compulsory licensing statute, unlike many countries, compulsory licensing can be granted by various judicial or statutory mechanisms.[204]

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202. THOMAS J. MICELI, THE ECONOMIC APPROACH TO LAW 180–81 (2d ed. 2009).

203. *See* Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698, 698–700 (1998).

204. *See* Mark W. Lauroesch, *General Compulsory Patent Licensing in the United States: Good in Theory, But Not Necessary in Practice*, 6 SANTA CLARA HIGH TECH. L.J. 41 (1990).

First, because an injunction for an infringement of a patent is a discretionary remedy, courts have exercised their authority to refrain from granting such injunctions, entitling the owner to compensation only—therefore establishing compulsory licenses in fact—under certain scenarios. This has been done mostly in the context of antitrust violations and other types of patent misuse, in which courts awarded compulsory licenses to other private parties to foster competition, with the patent owner entitled only to court-determined payments, mostly in the form of royalties.[205]

Differently, courts have been cautious about granting compulsory licenses to private parties due to non-use of the patent by the owner. The U.S Supreme Court noted in an early twentieth-century case that the right of a patentee not to use his invention is within the exclusive right granted under the patent laws, while leaving open the possibility that there might be situations in which non-use of a patent would prevent issuance of an injunction against the infringer.[206] Lower federal courts have later voiced concern over the practice of patent suppression, but generally refrained from granting compulsory licenses for the sole reason that the patent owner has not used the patent.[207]

Second, compulsory licenses are permitted under federal legislation in specific cases, such as under the Plant Variety Protection Act[208] or Clean Air Act,[209] with some of these acts authorizing the relevant U.S. Secretary or administrative agency to set the compensation paid to the owner.[210]

Such statutorily or judicially-mandated compulsory licenses in favor of private parties can be likened to a "private taking," in which the law denies a patent owner the right to exclude others and restricts her remedy to court-determined damages.[211] That said, this section focuses on more

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205. *Id*. at 47–48. In extreme cases, courts have also awarded royalty-free compulsory licenses to competitors.

206. Cont'l Paper Bag Co. v. E. Paper Bag Co., 210 U.S. 405, 423–24, 430 (1908).

207. That said, courts leave open the possibility of recognizing a "public interest" that justifies the granting of a compulsory license, when such an interest cannot be satisfied due to non-use. Lauroesch, *supra* note 204, at 49–52.

208. Plant Variety Protection Act, 7 U.S.C. §§ 2402-2404.

209. Clean Air Act of 1970, 42 U.S.C. § 7608 (Supp. IV 1986).

210. *See* William N. Monte, *Compulsory Licensing of Patents*, 25 INFO. & COMMC'NS TECH. L. 247, 252 (2016).

211. *See generally* Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517 (2009).

straightforward taking scenarios, in which *government* takes the license. Accordingly, I will use the general term "compulsory license" also for coercive governmental use, as described below.

The federal government's power to take a license without the patent owner's consent relies primarily on Section 1498(a) of the U.S. Code, according to which "[w]henever an invention described . . . covered by a patent . . . is used or manufactured by or for the United States without license of the owner thereof . . . the owner's remedy shall be by action . . . for the recovery of his reasonable and entire compensation for such use and manufacture."[212] Such an action is brought before the U.S. Court of Federal Claims, and for every such license taken by the U.S. government, there is one right to recovery that can arise, and "that right must occur upon the first manufacture or use by or for the government."[213] Therefore, unlike claims for infringement of a patent by private parties, in which the patent owner may recover for continued ongoing infringement, a nonconsensual use by the government results in the taking of a non-exclusive license in its favor, and the remedy of the owner is limited to a single measure of compensation.[214]

In some cases, the court explicitly justifies the granting of a compulsory license for the government by the existence of a "public interest" that affects public health, safety, environment, or national defense.[215] This would be particularly important when the compulsory non-exclusive license is required by a state or local government, for which Section 1498(a) does not apply. It is considered as an exercise, by analogy or directly, of the eminent domain power of that government. It requires, however, a case-by-case analysis of the court for justifying such compulsory license.[216]

It should be noted that at least as far as the federal government is concerned, it can also take the entire patent, and not just a non-exclusive license, based on its general power of eminent domain under the Takings Clause, which is generally viewed as applying also to intellectual

212. 28 U.S.C. § 1498(a).

213. 3rd Eye Surveillance, LLC v. United States, 133 Fed. Cl. 273, 276 (2017).

214. *Id*.

215. Lauroesch, *supra* note 204, at 48–49.

216. *See* Matthew S. Bethards, *Condemning a Patent: Taking Intellectual Property by Eminent Domain*, 32 AIPLA Q. J. 81, 110–11 (2004).

property.[217] While generally it would not make much sense for government to do so, taking the entire patent might be required in extraordinary circumstances, such as emergency situations. Thus, for example, government may decide to take over a company or even an entire industry, including its associated intellectual property, during wartime.[218]

Under case law, when the right taken through eminent domain is a compulsory license under Section 1498(a) of the U.S. Code, the compensation mechanism is based on a "reasonable royalty," and not the payment of "lost profits." Obviously, the patent owner would regularly prefer the latter method because the measure of lost profits would evidently incorporate the value of the monopoly based on whether the owner would have been able to set the prices, including in the consensual granting of a license. Such a measure would have reflected the pre-appropriation fair market value, because it would have assumed that the patent owner has the exclusive right to decide whether to grant licenses and at which prices. Respectively, the payment of a "reasonable royalty" would be preferable to the government.[219]

How is "reasonable royalty" determined in the case of a compulsory license to the government? In a series of decisions, the U.S. Court of Federal Claims designed a complex multi-factor test that involves a "highly case-specific and fact-specific analysis,' . . . relying upon 'mixed considerations of logic, common sense, justice, policy and precedent.'"[220] Moreover, although the court agrees that "the proper measure of damages is the injury to patentee rather than the government's taken benefit,"[221] the actual development of the doctrine seems much less straightforward

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217. This would be more problematic in the case of state or local governments, because a patent is a federally granted right that exists nationwide, and therefore, it cannot be limited by state or local territorial limits. *Id*. at 89–98.

218. *Id*. at 114–15 (discussing President Truman's failed attempt to take over steel mills during the Korean War).

219. *See* Brunswick Corp. v. United States, 36 Fed. Cl. 204, 208 (1996) (noting that "lost profits may not be a 'viable measure of recovery under 28 U.S.C. § 1498,' where such damages would 'amount to excessive compensation, rather than just compensation payable under the Fifth Amendment'" and that "[t]he award of lost profits assumes a right to exclusivity. The eminent domain theory of Section 1498(a) – allowing the United States to take a license under the patent for use or procurement – is at odds with such a right to exclusivity" (quoting DONALD S. CHISUM, CHISUM ON PATENTS § 20.03 (1995))).

220. Boeing Co. v. United States, 86 Fed. Cl. 303, 311 (2009) (citations omitted).

221. Brunswick, 36 Fed. Cl. at 209 (citing Leesona Corp. v. United States, 599 F.2d 958, 968–69 (Ct. Cl. 1979)).

in this respect, not only because of the rejection of the "lost profits" approach, but also because some of the components included in the analysis refer, explicitly or implicitly, to the specific government use.

The court notes that "[w]hen determining just compensation for any type of eminent domain action, including the unlicensed use of a patent, equitable principles of fairness control,"[222] and that while it "has discretion both in selecting the method and calculating the damages . . . the preferred manner is to require the government to pay a reasonable royalty for its license."[223] Per the court, a reasonable royalty is "the amount that a person who desires to manufacture, use, or sell a patented article would be willing to pay as a royalty and yet still be able to make a reasonable profit."[224] This method involves two steps: "(1) determination of a reasonable compensation base, i.e., the total value of the infringing items on which the plaintiffs are entitled to royalty payments, and (2) determination of a reasonable royalty rate to apply to that compensation base."[225]

In determining the total value of the infringing items to set the compensation base, the court looks to the "entire market value," defined as the "value of the entire apparatus containing several features, where the patent-related feature is the basis for customer demand."[226] In the 2017 *Fastship* case, the court apportioned the damages "based on the 'smallest salable patent-practicing unit' within the infringing article, meaning those features within the scope of the claimed invention."[227]

The more complex determination involves the royalty rate. In so doing, the court looks at whether there is an established market royalty rate applicable to this patent. When this is not the case, the court retroactively constructs a hypothetical negotiation "between a willing licensor and a willing licensee to determine the royalty rate upon which the parties would have agreed."[228]

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222. Standard Mfg. Co. v. United States, 42 Fed. Cl. 748, 757 (1999), *abrogated in other respects by* Uniloc USA, Inc. v. Microsoft Corp., 632 F.3d 1292 (Fed. Cir. 2011).

223. This is so in addition to the payment of damages for government's delay in paying the royalty. *Id*. at 758.

224. *Id*. at 759.

225. *Id*.

226. Boeing Co. v. United States, 86 Fed. Cl. 303, 316 (2009).

227. FastShip, LLC v. United States, 131 Fed. Cl. 592, 625 (2017), *aff'd as modified*, 892 F.3d 1298 (Fed. Cir. 2018).

228. Standard Mfg. Co. v. United States, 42 Fed. Cl. 748, 762 (1999).

The "willing-buyer/willing-seller" approach was outlined in the *Georgia-Pacific* case,[229] and recognized by the U.S. Federal Circuit in the *SmithKline Diagnostics* case.[230] *Georgia-Pacific* enumerates fifteen factors that should be considered in determining the reasonable royalty rate.[231]

At least one of these factors, that of the "extent and value of infringing use," looks specifically at the post-appropriation use and its value to the government, including "the extent to which the infringer has made use of the invention; and any evidence probative of the value of that use."[232] This factor can also consider the costs saved to the government by not having to use other, non-infringing but more expensive alternatives, to achieve the underlying governmental purpose.[233]

Moreover, in addition to the *Georgia-Pacific* fifteen factors, the U.S. Court of Federal Claims has ruled that in its discretion, it may consider a variety of other miscellaneous considerations to determine the reasonable royalty rate.[234] Here too, some of these additional factors explicitly address the nature and extent of the government use, and the public value it derives from it. Thus, the court may reduce the royalty rate "where the government procurement is massive."[235] The court can also compare the

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229. Ga.-Pac. Corp. v. U.S. Plywood Corp., 318 F. Supp. 1116, 1120–21 (S.D.N.Y. 1970), *modified and aff'd*, 446 F.2d 295 (2d. Cir. 1971).

230. SmithKline Diagnostics, Inc. v. Helena Lab'ys. Corp., 926 F.2d 1161, 1168 (Fed. Cir. 1991).

231. These factors are:

> (1) current, established royalty rates under the patent at issue; (2) royalty rates for comparable technology; (3) scope, exclusivity, and restrictiveness of a retroactive license; (4) the patent holder's established licensing and marketing practices; (5) commercial/competitive relationship of licensor and licensee; (6) derivative/convoyed sales of unpatented, accompanying materials by patentee and competitors; (7) duration of patent and license terms; (8) profitability and commercial success of invention; (9) utility and advantages of invention over prior art; (10) nature, character, and benefits of use; (11) extent and value of infringing use; (12) allocation of a portion of profits or sales for use of invention; (13) portion of realizable profits creditable to the invention alone; (14) expert testimony on royalty rates; and (15) the totality of other intangibles impacting a hypothetical negotiation between a willing licensor and licensee.

FastShip, 131 Fed. Cl. at 610 (quoting Brunswick Corp. v. United States, 36 Fed. Cl. 204, 211 (1996)).

232. *Standard Mfg.*, 42 Fed. Cl. at 763.

233. *See id.* at 774.

234. Brunswick Corp. v. United States, 36 Fed. Cl. 204, 211–12 (1996).

235. *Id.* at 211.

"infringer's profits with the patent holder's risks and ability to license the subject matter." It can also "adjust the rate upward if there were substantial capital expenditures associated with performance of the government contract."[236] All of these factors consider, therefore, the extent and value of the government use, and in particular, whether the governmental taking of the compulsory license, at a particular point in time, results in special public benefits for purposes of determining the reasonable royalty rate that the government should pay to the owner.

The linkage between the payment of royalties as compensation and the value of post-expropriation use is particularly manifested in the case of compulsory licenses for essential pharmaceutical products protected by patents. The use of compulsory licenses is prevalent in many countries around the world, and it has been sanctified in international law, as part of the Agreement on the Trade-Related Aspects of Intellectual Property (TRIPS), as amended in 2017.[237] The TRIPS Agreement explicitly recognizes the right of Member States to grant compulsory licenses for patents against payment of "adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization."[238] Moreover, in the case of a "national emergency or other circumstances of extreme urgency or in cases of public non-commercial use," the granting of such a compulsory license is not subject to the showing of an effort by the government or another proposed user to obtain authorization from the right-holder within a reasonable period of time.[239]

Furthermore, while under the original version of the TRIPS Agreement, the use of compulsory licenses was to be "authorized predominantly for the supply of the domestic market of the Member authorizing such use,"[240] the amendment to the Agreement, following the 2001 Doha Declaration,[241] also allows member countries to export a "pharmaceutical product" made under a compulsory license, when an

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236. *Id*.

237. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (amended Jan. 23, 2017) [hereinafter TRIPS Agreement].

238. *Id*. art. 31(h).

239. *Id*. art. 31(b).

240. *Id*. art. 31(f).

241. World Trade Organization, Declaration on the TRIPS Agreement and Public Health, WTO Doc. WT/MIN(01)/DEC/2, 41 ILM 755 (2002) [hereinafter Doha Declaration].

importing country lacks the manufacturing capability.[242] The term "pharmaceutical product" refers to products "needed to address the public health problems,"[243] as recognized in paragraph 1 of the Doha Declaration, which focuses on "public health problems afflicting many developing and least developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics."[244] In such case, "adequate remuneration pursuant to Article 31(h) shall be paid in that [exporting] Member taking into account the economic value to the importing Member of the use that has been authorized in the exporting Member."[245]

The "compensation base" (to borrow the term used in U.S. law) relies, therefore, on the post-appropriation value of the product to the country issuing the compulsory license or to another country that imports such a product. While the pharmaceutical industry has one of the highest private, market-based voluntary royalty rates of any industry at 4-5 percent of the retail price (with the retail price evidently reflecting the value of the exclusive patent),[246] in the case of a compulsory license and generic production, each country sets its own royalty rate. Thus, for example, Japan has set royalties from 0 to 6 percent of the price charged by the generic competitor, while Canada sets royalties for drugs exported to countries without drug manufacturing capability at 0 to 4 percent of the generic price, depending upon the level of development of the importing county.[247]

In so doing, countries generally adhere to the Renumeration Guidelines set forth by the World Health Organization (WHO), for treating such epidemics, by which "to provide access to medicine for all,

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242. *See* TRIPS Agreement, *supra* note 237, at art. 31bis(1) (explaining the circumstances when the typical obligations of an exporting Member do not apply regarding pharmaceutical products made pursuant to a compulsory license); *id*. at Annex, para. 2(a)-(c) (describing the specifications and requirements to be an eligible importing Member); *id*. at Appendix to the Annex to the TRIPS Agreement (outlining how manufacturing capacities in the pharmaceutical sector are assessed).

243. *Id*. at Annex to the TRIPS Agreement, para. 1(a).

244. Doha Declaration, *supra* note 241, para. 1.

245. TRIPS Agreement, *supra* note 237, art. 31bis(2). To avoid double renumeration, Article 31bis(2) further provides that "the obligation of that Member under Article 31(h) shall not apply in respect of those products for which remuneration in accordance with the first sentence of this paragraph is paid in the exporting Member." *Id*.

246. Monte, *supra* note 210, at 265.

247. *Id*. at 266.

royalty payments generally should not exceed a modest fraction of the generic price."[248]

Following the coronavirus crisis, countries throughout the world have either issued compulsory licenses,[249] or otherwise extended their authority to do so,[250] for existing pharmaceutical products developed for other diseases, which may also aid in the treatment of the coronavirus. Renumeration for the taking of compulsory licenses will likely also be "a modest fraction of the generic price."

Obviously, calculating royalties for the taking of a compulsory license (which in some cases may practically result in the taking of the entire patent when the entire market pays generic prices) based on the post-appropriation value to the government works to the disadvantage of the patent owner. This is so because the value to the government (and the respective general public) is one reflecting generic pricing, such that the patent owner involuntarily "subsidizes" the pre-appropriation use value that inherently reflects the value of the patent and its temporary monopoly.

That said, reliance on the post-appropriation value of the asset can and should be done also in other cases of a temporary eminent domain. The normative case for relying on the post-appropriation value, at least partially, is particularly strong when the choice of timing for the temporary, coerced government use points to a particularly significant public value during this segment, and when there is an affinity between the pre-appropriation and post-appropriation uses. This should be so also if reliance on the post-appropriation value works to the advantage of the right-holder, as compared with calculating just compensation based on pre-appropriation value.

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248. James Love, *Remuneration Guidelines for Non-Voluntary Use of a Patent on Medical Technologies*, WORLD HEALTH ORGANIZATION [WHO], at 6, WHO/TCM/2005.1 (2005), https://apps.who.int/iris/bitstream/handle/10665/69199/WHO_TCM_2005.1_eng.pdf?sequence=1&isAllowed=y.

249. *See* Steven Scheer & Julie Steenhuysen, *Israel Approves Generic HIV Drug to Treat COVID-19 Despite Doubts*, REUTERS (Mar. 19, 2020, 8:35 AM), https://www.reuters.com/article/us-health-coronavirus-israel-drug/israel-approves-generic-hiv-drug-to-treat-covid-19-despite-doubts-idUSKBN216237.

250. *See* Adam Houldsworth, *The Key COVID-19 Compulsory Licensing Developments So Far*, IAM (Apr. 7, 2020), https://www.iam-media.com/coronavirus/the-key-covid-19-compulsory-licensing-developments-so-far.

E. *Recalibrating Just Compensation for Temporary Eminent Domain*

This section outlines some key principles that should govern the payment of just compensation for temporary physical takeovers that amount to a taking. Although the baseline for such compensation, as established by the U.S. Supreme Court, has been one of "fair rental value" while disregarding various types of consequential damages, this section highlights various instances under which the payment of just compensation should reflect additional or entirely different value components. As noted in earlier parts of this Article, particular attention is paid to situations in which the government's choice to take over a certain asset at a specific point in time results from a particularly high public value that the asset may have during that time, or even from opportunism. Also, this section argues that for temporary eminent domain, a close affinity between the pre-appropriation and post-appropriation uses may call for calculating compensation as a certain percent of the value of the public use, even if this is not the case with permanent eminent domain.

A caveat is in order at the outset. This Article focuses on the "just compensation" requirement in the federal constitution's Takings Clause and the interpretation and implementation of this term by the U.S. Supreme Court and lower courts. That said, takings jurisprudence, including explicit eminent domain proceedings or commandeer orders, as well as inverse condemnation claims, may also involve a variety of federal legislative and regulatory norms alongside state constitutional law, statutory law, and common law. This variety has both procedural and substantive implications for calculating compensation, creating potential divergences between different types of actions. Accordingly, any call for reform in the principles of compensation, such as the ones made in this Article, should ideally be incorporated in the various federal and state law norms that may apply.

For example, inverse condemnation suits against non-federal defendants are often brought under 42 U.S.C. § 1983 ("civil action for deprivation of rights"),[251] also known as 1983 actions.[252] The U.S.

251. 42 U.S.C. § 1983.

252. Siegel & Meltz, *supra* note 95, at 520–21; *see also* Knick v. Township of Scott, 139 S. Ct. 2162 (2019) (holding that a property owner has an actionable Fifth Amendment takings claim when a non-federal government takes his property without paying for it, so that he can bring a claim in federal court under § 1983 without being required to exhaust state law remedies beforehand).

Supreme Court has typified 1983 actions as inherently different from condemnation proceedings, not only in the sense that the former are initiated by property owners rather than by government, but more substantially in that a 1983 action "creates a species of tort liability."[253] This is so because unlike the case of an eminent domain proceeding, in which liability is uncontested and a dispute may arise only in regard to the amount of compensation, in a 1983 action the plaintiff must prove that a certain government act is an invasion of rights that amounts to an uncompensated taking. If this is the case, government is held liable in damages for the wrongful denial of the plaintiff's constitutional right to the payment of just compensation. Accordingly, the Court has interpreted 1983 actions "in light of the background of tort liability."[254]

But once the right to compensation in a 1983 action is based on tort law, this also means that it will be limited by its traditional principles, such that the plaintiff will not be entitled to recover compensatory damages (but only nominal damages) in a 1983 action "absent proof of actual injury."[255] Moreover, under the traditional common law of trespass, compensatory damages are paid for actual harm, such that in the absence of damage or diminution in market value, owners were limited to nominal damages of one dollar to mark that a legal wrong has been inflicted on them.[256]

The principles of the law of trespass may also impact temporary government encroachments. This is so because courts have held that "where a landowner suffers specific damage to his property as a result of the negligent acts of a party with the power of eminent domain, the proper action lies in trespass,"[257] whereas when the injury "is a direct result of intentional action," the plaintiff can initiate a de facto condemnation claim in addition to or following a cause of action in trespass.[258]

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253. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 755 (1999) (quoting Heck v. Humphrey, 512 U.S. 477, 483 (1994)).

254. *Id*. at 709–15.

255. Farrar v. Hobby, 506 U.S. 103, 114 (1992).

256. Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1393–95 (2013) (suggesting, however, that courts have in recent years become more receptive to the idea that the traditional measure of damages fails to protect properly the rights of owners, and are also introducing punitive damages in some cases).

257. Poole v. Township of District, 843 A.2d 422, 424 (Pa. Commw. Ct. 2004).

258. *In re* Mountaintop Area Joint Sanitary Auth., 166 A.3d 553, 561–63 (Pa. Commw. Ct. 2017).

These limits on compensation may therefore have a particular bearing on some of the instances of temporary government takeovers that have been discussed in previous parts and are explored further in this section, such as when government temporarily takes over a vacant lot or abandoned building for a certain public use, or commandeers a hotel at a time of low or no market demand, while arguing that the owner does not suffer an actual damage as a result of the temporary takeover. To the extent that the normative arguments made in this Article justify the reconsideration of some of the "just compensation" principles developed in the context of the Constitution's Takings Clause jurisprudence, this should also prompt a reconsideration of other principles in federal and state law that have a bearing on various causes of actions dealing with temporary eminent domain.

1. Fair Rental Value When There is No Clear Present Value

As shown in Part III.A above, just compensation established in case law for temporary eminent domain is generally based on the market value of renting the asset for the relevant period, being "the price that a willing lessee would pay to a willing lessor for the period of the taking,"[259] or the market-rate rent of a "building on a lease by the long-term tenant to the temporary occupier."[260]

But what happens when the land or buildings erected on it have no clear present value? Consider the case of hotels or convention centers that stand empty during the coronavirus crisis due to lockdown or travel restrictions, or simply because of lack of demand due to health concerns. What compensation should be paid by government when it commandeers such properties to accommodate coronavirus patients, people required to be in quarantine, or homeless people?

If government engages in voluntary transactions with owners of hotels or convention centers, consideration paid in such cases can serve a point of reference for the payment of just compensation in the case of temporary eminent domain or commandeer orders for equivalent assets.

What should be done if there is no clear market reference relevant for such an extraordinary period? Should compensation be fixed at zero—if government takes full command over the operation of the provisory public use—or limited strictly to out-of-pocket expenditures if the owner

259. Heydt v. United States, 38 Fed. Cl. 286, 309 (1997).

260. United States v. Gen. Motors Corp., 323 U.S. 373, 382 (1945).

of the hotel or convention center is assigned with the actual operation of such a temporary use?

I suggest that such an approach, which could be arguably based on a concept of "no actual losses" or "no market value," is wrong. First, it disregards the non-instrumental injury that may be caused to the owner when the asset is entirely taken over by the government for a substantial, even if temporary, period of time, as well as the potential long-term reputational damages that the owner may incur, for example, if an asset such as a hotel is then stigmatized as "the corona hotel."[261]

From the government's perspective, commandeering or otherwise temporarily taking private property during a time of emergency, to prevent a public bad, when the asset itself is not part of the public danger (unlike the case of the temporary evacuation of corona-infested residences) should only be done if the government cannot utilize enough public properties for this purpose. Otherwise, the use of privately-owned properties might be regarded as arbitrary or capricious, or alternatively as exploiting the particular vulnerability of such assets during the time of crisis.[262]

The payment of compensation is therefore normatively warranted to deter the government from engaging in a sort of a "fiscal illusion,"[263] by which it can temporarily take without compensation a hotel because the owner cannot show a market value due to a temporary crisis beyond her control. Accordingly, while the government does not have to meet the high threshold of the public necessity doctrine to exercise its power of commandeering or eminent domain,[264] obliging the government to pay compensation in such cases would require it to carefully exercise its discretion in employing a temporary, yet significant, power to take over private assets such as hotels or convention centers.

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261. *See, e.g.*, Catherine Carlock, *Boston Hotels 'May Face Stigma' Due to Coronavirus-Linked Biogen Meeting*, BOS. BUS. J. (Apr. 6, 2020, 2:40 PM), https://www.bizjournals.com/boston/news/2020/04/06/boston-hotels-may-facestigma-due-to-coronavirus.html; Mohammad Ghazali, *Drafted as Quarantine Centres, Punjab Hotels Stare at Losses, "Stigma,"* NDTV (May 24, 2020, 11:37 PM), https://www.ndtv.com/india-news/coronavirus-lockdown-punjab-hotels-turned-quarantine-centres-fight-losses-stigma-2234313.

262. *See supra* text accompanying notes 192–93.

263. For the "fiscal illusion" argument as a justification for the payment of just compensation for a taking, see Lawrence Blume et al., *The Taking of Land: When Should Compensation Be Paid?*, 99 Q.J. ECON. 71, 88 (1984).

264. *See supra* text accompanying notes 166–74.

What should be the benchmark for just compensation in such instances of temporary takings? As noted above, if either of the parties can present as evidence government procurements with asset owners during the same period, or in past periods of emergency requiring such temporary uses, this should serve as the baseline for just compensation in the case of temporary eminent domain.

If no such transactions can be demonstrated, compensation should include, at the very least, reasonable costs incurred to the property owner because of the need to remove certain fixtures or amenities during the time of the temporary use, the costs of refurbishment of the asset at the end of the temporary use, as well as a fixed sum which should represent the potential long-term reputational effects that such a temporary use may have on the future market image of the asset. Such an estimate could be based on future-looking reputational damages in other fields of law.[265]

As for the payment of daily rates per room in the case of a hotel (or for an entire space in the case of a convention center), the court can offer a conservative evaluation by looking at the history of market prices, and adopting a certain minimum rate that reflects times of lower market demand. The purpose here should be one of striking a proper balance between making payments of compensation that would cover costs and potential consequential damages while also deterring government against opportunism, and refraining from excessive payments that would amount to an unjustified windfall (such as payment of compensation equivalent to hotel rates during times of peak market demand).

What should be the case for the mirror-image of temporary public use of vacant lots or abandoned buildings during "wait periods"? Once again, to the extent that the court can identify arms-length transactions made between landowners and governments or private parties for the temporary use of a vacant lot or abandoned building for similar uses, then such consideration can serve as a basis for calculating just compensation in the case of temporary eminent domain.

When this is not the case, I argue that trying to reconstruct a pre-condemnation market value for the vacant lot or abandoned building, based on a hypothetical "highest and best use" of the land given the

265. *See, e.g.*, Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 693–99 (1986) (discussing the role of reputation in the marketplace as "property" and the conditions under which persons or businesses should be compensated for market reputational damages in defamation cases).

zoning scheme in force,[266] would be practically difficult and normatively problematic in the context of a temporary eminent domain. This is especially so when the timeframe of the public use is not particularly long and the temporal vacancy is due to market dynamics, such that awarding the owner compensation based on a time-segment of long-term "highest and best use" would amount to a windfall. At the same time, awarding no compensation based on the argument that the land or building has no actual value at the particular point in time in which it is temporarily taken might create an ill-incentive for local governments to delay the granting of building permits of procedures of rezoning in order to have privately owned land available "for free" (thus constituting another variety of fiscal illusion).

The appropriate solution for calculating just compensation in such cases should be one of shifting the focus from the pre-appropriation market value to the post-appropriation public value. As noted above, local, state, and federal governments are routinely using evaluation methods for establishing the long-term value of various public uses, from infrastructure to recreation.[267]

Accordingly, the payment of just compensation could be based on paying the landowner a certain percent of the relevant time-segment value of the public use. In case the public use operated by the government is commercialized, such as by selling concessions to vendors in farmers markets or a temporary public park, or charging other fees from businesses, [268] such revenues should be incorporated in assessing the temporal public value and the derivative portion that should be paid to the landowner for the coerced use of the property during the relevant period of time. As I show in subsection (3) below, such profit-sharing would make sense normatively and practically.

2. Considering Actual Damages and Lost Profits

As the U.S. Supreme Court noted in the *General Motors* case, the calculation of "fair market value," in the case of a permanent taking,

266. *See* Stephen Sussna, *The Concept of Highest and Best Use Under Takings Theory*, 21 URB. LAW. 113, 128 (1989) ("[T]he highest and best use is derived from the analysis of all present and prospective uses which are not speculative.").

267. *See supra* text accompanying note 164.

268. For a critical view of the growing commercialization of urban public space, see Andrew Smith, *Paying for Parks. Ticketed Events and the Commercialisation of Public Space*, 37 LEISURE STUD. 533 (2018).

measures the long-term market value of the fee. But it does not include in addition consequential damages or costs, such as loss of profits, expenses of moving removable fixtures and personal property, or loss of goodwill that inheres in the location of the land, because "all these elements would be considered by an owner in determining whether, and at what price to sell."[269] In the case of temporary eminent domain and the payment of "fair rental value," the rule against payment of just compensation for consequential damages or lost profits would apply when the term of the temporary government takeover exceeds the term of a lease for which a leaseholder is compensated, as was the case in *Petty Motors*,[270] or when the premises are vacant when taken over by the government and then returned to the owner in similar condition at the end of the term. In contrast, as demonstrated in *General Motors*, matters change in the case of a "temporary occupancy of a building equipped for the condemnee's business, filled with his commodities, and presumably to be reoccupied and used, as before . . . on the termination of the Government's use."[271] Just compensation should include at least some of the consequential costs or damages to the condemnee, such as the costs of temporary removal and storage of personal property and the cost of "fixtures and permanent equipment destroyed or depreciated in value."[272]

Another measure of compensable actual damages or costs has been demonstrated in the *Pewee Coal* case,[273] in which the U.S. government allegedly possessed and operated a private coal mine from May 1 to October 12, 1943, to prevent a potential strike over a nation-wide, wage-related dispute, but the actual payment of wages to the miners was continued to be done by Pewee Coal. Accordingly, the Court viewed as compensable operating losses the increased wage payments that Pewee Coal made to miners during that period, to comply with a War Labor Board decision.[274]

The payment of damages or costs, in addition to, or in lieu of, "fair rental value," is relevant also for a variety of cases, in which courts recognize as temporary physical takings government actions that interfere

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269. United States v. Gen. Motors Corp., 323 U.S. 373, 379 (1945).

270. United States v. Petty Motor Co., 327 U.S. 372, 379–81 (1946); *see also supra* text accompanying notes 76–77, 135–36.

271. *Gen. Motors Corp.*, 323 U.S. at 380.

272. *Id.* at 383–84.

273. *See* United States. v. Pewee Coal Co., 341 U.S. 114 (1951).

274. *See id.* at 117.

with the possession and use of private properties, without entirely taking over them. One such example has to do with the intermittent flooding cases, discussed by the U.S. Supreme Court in the *Arkansas Game and Fish Commission* case,[275] and the temporary or permanent damages caused to land, including destruction of timber, due to such form of temporary taking.

What about loss of profits? When would an owner of an asset be entitled to compensation on the lost revenues that she could have made by using the asset during the period in time in which it was taken over by the government, when such revenues exceed the fair rental value of the asset?

The most prominent case in which the owner of an asset was compensated for the temporary loss of its going-concern value is *Kimball Laundry*.[276] As analyzed in Part III.B, the payment of just compensation for the loss of profits during the time of the temporary eminent domain was based on the fact that the U.S. military took over the laundry plant because it wanted to use it for the same purpose—but for the benefit of the military personnel—while retaining most of Kimball Laundry's employees, meaning that the condemnee had to suspend business to its own clientele and lost its trade routes and going-concern value for the duration of the government occupancy.[277]

Therefore, unlike the case in which land or another piece of property is temporarily taken from the owner, but she can move her business elsewhere by reinvesting the compensation paid, in *Kimball Laundry*, the pre-appropriation and post-appropriation uses were affiliated not only thematically, but also physically in the sense that the owner's line of business remained "locked" in the premises, and it had to wait until the end of the eminent domain to resume its own activity.

That said, there are good reasons to limit compensation for temporary lost profits, both practically and normatively, at least in these instances in which the condemnee's ability to engage in productive activity is *not* entirely captured by government for the duration of the taking.

This should be so particularly when the underlying reason for using the power of eminent domain lies in a justifiable public purpose that seeks

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275. *See* Ark. Game & Fish Comm'n v. United States, 568 U.S. 23 (2012).

276. *See* Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).

277. *Id*. at 3, 16; *see also supra* text accompanying notes 78–80, 137–40.

to limit a monopolistic stance that the owner enjoyed in owning and controlling the asset. As the case study of compulsory licenses for patents discussed in Part IV.D shows, the basic premise behind the authority granted to government to take compulsory licenses, or even the entire patent, lies in the fear that the owner could "hold up" the use of the patent-protected knowledge to promote a socially-desirable goal by requiring that the payment or royalties or consideration for the patent would reflect its monopolistic value. Probably the most prominent example has to do with the taking of a license in a patent-protected pharmaceutical knowledge to allow for the generic production of life-saving medicines at affordable prices. Allowing the patent owner to recoup lost profits resulting from the loss of monopolistic prices undermines the very purpose for which the power of eminent domain is granted. This is why the payment of a "reasonable royalty" in such cases should be calculated as a certain percent of the price of a generic product, rather than that of a monopolistic product. In other words, the payment of lost profits should be denied, both practically and normatively, when the pre-appropriation use and market dynamic are considered as *requiring* a government takeover.

3. Sharing in Revenues/Benefits from the Public Use

The U.S. Supreme Court has persistently held that "[s]ince the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker,"[278] and it has done so also in the context of temporary physical takings.[279] That said, as a practical matter, courts often do resort to the post-appropriation use and value as a basis for calculating just compensation, as is the case with the payment of royalties for compulsory licenses as a fraction of the post-appropriation value of generic production of pharmaceutical products by or for the government.[280] While in such cases, the sharing of revenues in the public value puts the patent owner in a worse spot as compared with basing compensation on the pre-appropriation value, in other cases a condemnee may stand to benefit from assessing just compensation as a fraction of the public value. Such an approach may also be normatively justified for some types of temporary eminent domain.

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278. United States v. Miller, 317 U.S. 369, 375 (1943).

279. United States v. Causby, 328 U.S. 256, 261 (1946) ("It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken.").

280. *See supra* text accompanying notes 246–50.

The debate about whether just compensation should also reflect post-appropriation value is predominantly held in the context of permanent eminent domain, when the public purpose for which private property is taken can yield monetary profits to government or to other private parties to which rights in the confiscated asset are later transferred. This longstanding debate has been reinvigorated following the *Kelo* decision,[281] which validated the use of eminent domain for economic development (or redevelopment), meaning in that case that dozens of properties were appropriated by government and then transferred to Pfizer for a research facility and to other private companies to develop waterfront hotels, offices, retail spaces, and other for-profit uses.[282]

A few years later, another high-profile debate arose in New York State, when the Court of Appeals validated the use of the State's and New York City's eminent domain power for the Atlantic Yards project in Brooklyn, [283] in which dozens of private properties, among them apartments, were taken to set up a $5 Billion mixed-use private development including the Barclays Center sports arena.[284]

Out of numerus proposals to fix the compensation regime for eminent domain, a few explicitly focus on establishing just compensation, at least partially, on the asset's post-appropriation value.

Amir Licht and this author have addressed large-scale, for-profit development projects that require the assembly of land from numerous owners.[285] The potential anticommons problem arising from the need to assemble consent,[286] in the face of potential holdouts, may justify government intervention through eminent domain. At the same time, the arbitrage between the pre-appropriation and post-appropriation values of the land may skew the incentives of government and other stakeholders for initiating such land development projects, and would leave landowners undercompensated. To resolve this problem, while recognizing that the taking component of eminent domain may need to

281. *See* Kelo v. City of New London, 545 U.S. 469 (2005).

282. *See* LEHAVI, *supra* note 186, at 214–15.

283. *See* Goldstein v. N.Y. State Urb. Dev. Corp., 921 N.E.2d. 164 (N.Y. 2009).

284. *See* LEHAVI, *supra* note 186, at 223–25.

285. *See* Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. 1704 (2007).

286. *See generally* MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES (2008).

remain an involuntary nonmarket transaction, we proposed a market-based mechanism for the compensation component in the form of a Special-Purpose Development Corporation (SPDC). An SPDC would acquire unified ownership of the land and the development project, and would offer condemnees a choice between receiving pre-project "fair market value" compensation or *pro rata* shares in the SPDC. The SPDC would emerge from this stage with several stockholders, including landowners-turned-shareholders. The SPDC would then either auction its land rights or else negotiate these land rights with potential developers, with such sale or auction prices evidently reflecting at least some of the post-appropriation value of the assembled lands. The SPDC would then distribute the net proceeds from the sale as dividends to its shareholders. Landowners-turned-shareholders may be thus entitled to some of the post-appropriation value.[287]

Writers have also suggested other mechanisms that may be based, at least partially, on the post-appropriation value of the condemned property. Under one suggestion, in the case of eminent domain for the purpose of constructing a sports stadium, condemnees will be entitled, in addition to the payment of pre-appropriation fair market value, to post-appropriation periodic payments deriving from a local property tax or sales tax imposed on concession items and other goods sold at the stadium, which would be levied on the stadium owner or the relevant sports team.[288]

While payment of just compensation based, at least partially, on post-appropriation value remains contested and has not been recognized in the doctrine dealing with permanent eminent domain, I argue that such a concept would make particular sense, both normatively and practically, in some instances of temporary eminent domain. This should be so especially when the government attributes a particularly high value to taking over the assets during a specific point in time, and when there is an affinity between the pre-appropriation and post-appropriation uses.

Consider, for example, a government's hypothetical decision to take over a company that engages in the production of goods with a particularly high value during a certain time of emergency (even if not patent-protected), such as high-end ventilators during the COVID-19 crisis. It does so for the purpose of providing such goods at lower prices

287. *See* Lehavi & Licht, *supra* note 285, at 1731–35.

288. *See* Reymond Huang, *Eminent Domain and Stadium Construction: Why "Just" Compensation Is Insufficient*, 51 U. PAC. L. REV. 79, 97–99 (2019).

to the local population, but at the same time, it exports surplus products it makes in the plant to other countries at higher prices, while taking advantage of its streamlined channels of commerce and distribution to such countries. Once the crisis and the increased temporary demand are over, it hands the plant back to the owner.

In such a case, paying the condemnee only "fair rental value" or even some additional measure of lost profits reflecting its pre-appropriation going-concern value (as was the case in *Kimball Laundry*)[289] would incentivize the government to act opportunistically during a time of emergency and would deny the owner of singular temporary profits she could have enjoyed, at least partially.

The solution for such a potential problem should not necessarily lie in flatly denying the government from using its power of temporary eminent domain (to the extent that this can allow for more effective use and distribution of the goods) but rather in recalibrating just compensation, so that it would reflect at least a certain percent of the post-appropriation value stemming from market sales, somewhat similarly to the payment of royalties in cases of compulsory licenses for patents. Such a measure would reflect a truly "fair value" when government engages in such types of temporary eminent domain or commandeer orders, discussed in earlier parts of this Article.

F. *A New Taxonomy of Temporary Eminent Domain*

The analysis offered in this Article sets the ground for a new taxonomy of temporary eminent domain, one which identifies a set of key factors that distinguish temporary government takeovers from permanent ones, and that accordingly establishes parameters for deciding which types of temporary takeovers amount to a taking, and how should just compensation be set in such cases.

These factors, investigated in this Article by referring to case law and other actual instances of temporary physical takeovers include, inter alia, the following considerations:

(1) The scope of the temporary physical takeover and whether it practically denies the owner or leaseholder from possessing and using the asset, as demonstrated in the *Arkansas* case concerning intermittent flooding, discussed in Part III.A.

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289. *See* Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).

(2) Is the temporary takeover intended to prevent a temporary and exceptional public harm resulting from the asset itself, and which is not derived from the long-term productive use of the asset, as discussed for various scenarios in Part IV.B?

(3) For purposes of establishing the amount of just compensation: are there specific harms or costs to the right-holder resulting from delivering the asset to government and/or from repossessing the asset after the temporary use, as discussed in analyzing the differences between the *General Motors* and *Petty Coal* cases in Part III.B?

(4) In order to determine whether just compensation should be based, at least partially, on the post-appropriation value of the asset: how time-sensitive is the temporary value of the public use as compared with the long-term value of the asset, and does this potential arbitrage raise the fear of opportunistic behavior by government?

(5) For purposes of establishing the basis of the temporary value: is there an affinity between pre-appropriation and post-appropriation uses, as manifested in *Kimball Laundry* and *Pewee Coal*?

(6) Are there long-term impacts from the temporary government use that will spill over to the value of the asset once it is returned to the owner, as in the case of potential reputational damages inflicted on owners of commandeered hotels that may be later stigmatized as "the corona hotels"?

Based on these considerations, the following non-exhaustive table may be instrumental for creating a new legal taxonomy of the power of governments to temporarily take over private property, exercised either during times of emergency or in "wait periods."

<table>
<tr><th>Affinity between Pre-Takeover and Post- Takeover Uses

Purpose of Temporary Takeover</th><th>Strong or Substantial Affinity</th><th>Weak or No Affinity</th></tr>
<tr><td>Promoting a public benefit</td><td>Temporary takeover of private factory for related government production.
Kimball Laundry
Pewee Coal
Defense Production Act
⬇
Temporary eminent domain.
Compensation should exceed “fair rental value” to include lost profits for pre-takeover going-concern value or portion of post-takeover value in appropriate cases.</td><td>Temporary takeover of private asset for unrelated public use.
General Motors
Petty Motors
⬇
Temporary eminent domain.
Compensation: fair rental value + consequential costs or damages due to temporary removal/relocation of assets.

Temporary takeover of vacant lots / abandoned buildings in “wait periods” for public use.
⬇
Temporary eminent domain.
Compensation should reflect portion of value of temporary public use, including revenues from concessions and other forms of commercialization.</td></tr>
</table>

	Compulsory license for governmental use of a patent. ⬇ Eminent domain (practically temporary because of patent expiration after 20 years). Compensation: "Reasonable royalty" should also consider value of government use (*Georgia-Pacific*, *Fastship*) or be calculated on the basis of generic pricing (TRIPS).	Temporary physical invasion that does not oust the owner, to promote a government use. *Elbert:* construction easement *Causby:* overflights ⬇ Temporary eminent domain if invasion meets factors set forth in *Arkansas* (Part III.A). Just compensation should reflect permanent damages, or diminution in market value.

Affinity between Pre-Takeover and Post- Takeover Uses / Purpose of Temporary Takeover	Strong or Substantial Affinity	Weak or No Affinity
Preventing a Public Harm	Temporary takeover of <u>hazardous</u> premises (such as for evacuation of infected residences), while inflicting <u>temporary</u> damage to owner. ⬇ Generally, not compensable.	Temporary takeover of hotels or convention centers to accommodate corona patients, people under quarantine order, homeless, violent spouses. ⬇ Temporary eminent domain. Compensation: If there is no current market demand, just compensation should include full indemnification for costs (or low-end past market rates) plus potential stigma damage.
	Temporary takeover of <u>non-hazardous</u> premises to prevent danger from interconnected asset, while inflicting <u>temporary</u> damage to owner. ⬇	

	Government should meet lower threshold of necessity.	
	Temporary takeover of hazardous premises, while inflicting permanent damage. *National Board of YMCA*. ⬇ Generally, not compensable.	Temporary physical invasion that does not oust the owner, to prevent public harm *not* generated by the asset itself. *Arkansas Game & Fish*: government-induced flooding from military dam. ⬇ Temporary eminent domain if invasion meets factors set forth in *Arkansas* (Part III.A). Just compensation should reflect permanent damages, or diminution in market value.
	Temporary takeover of non-hazardous premises to prevent danger from interconnected asset, while inflicting permanent damage to owner. *Bowditch:* demolition of building to stop spread of fire. *Trinco*: "back burning." ⬇ Government should meet public necessity doctrine.	

Table 1: Taxonomy of Temporary Takeovers of Private Property by Government

V. CONCLUSION

The COVID-19 crisis exemplifies, probably more than any other time of emergency in recent history, the challenges of government action in the face of rapid changes, uncertainty, and imperfect information. Such a crisis requires governments to act quickly, often having to change course time and again within a short period of time, in order to effectively tackle unprecedented and complicated contingencies that affect every aspect of our lives. In such times, government needs to have access to resources, from real estate to medical knowledge, that are essential for handling the crisis, alleviating imminent risks, and providing relief to its residents.

In some cases, the government may need to exercise its powers to physically take over private property on a temporary basis in order to a promote a pressing public purpose. While the tentative importance of granting such power to the government is evident, and the temporary nature of the government appropriation is in many cases truly distinguishable from permanent appropriations, it is essential to take stock of the various costs that property owners may incur even during a limited amount of time, and whether some of these costs may spill over beyond the term of the takeover. Moreover, it is essential to make sure that the government uses its powers for a truly justified purpose and in a manner that is tailored to the particular circumstances calling for such temporary measures, and does not abuse the time of emergency to engage in opportunistic or rent-seeking behavior.

This Article has set out to offer a new and comprehensive taxonomy of temporary eminent domain, seeking to distinguish between intermittent takeovers that amount to a compensable taking and those that do not, and to offer a consolidated theoretical analysis for temporary physical takeovers that take place during times of emergency alongside those that happen in "wait periods."

In so doing, this Article has shown that while the harm/benefit distinction is often untenable in the case of permanent government measures, it might make sense in identifying which types of temporary nonconsensual measures may be regarded as a temporary physical taking.

Moreover, temporary eminent domain needs to be distinguished, both qualitatively and quantitatively, from permanent eminent domain in identifying the basis for just compensation. A simplistic transition from "fair market value" in the case of permanent eminent domain to "fair rental value" for temporary eminent domain is often inappropriate.

Because of the unique aspects of temporary physical takings, legal rules on compensation should often seek to cover lost profits or actual damage, which may occur to the property owner before and after the temporary takeover.

In some cases, compensation for temporary eminent domain should be based on the value to the government (and the public) from the temporary use of the property, although such a concept does not apply to permanent eminent domain. This should be so especially when the government attributes a particularly high value to taking over the assets during a specific point in time (and this time only), and when there is an affinity between the pre-appropriation and post-appropriation uses, such that the government's action may be even considered opportunistic—exploiting the specific asset for a short segment of time and profiting from this use, at the expense of the owner. The payment of just compensation should be therefore attuned to reflect the particular imbalance of power between government and private parties that may occur in the case of temporary eminent domain.